No. 91-1229-CFX
Status: GRANTED

Title: United States by and through Internal Revenue Service, Petitioner
v.
Bruce J. McDermott, et al.

Docketed:
January 29, 1992

Court: United States Court of Appeals for the Tenth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Davis,T. Richard, Adler,Steven F.

Time to file ext by J. White to & inc Jan. 30, 1992.
CITED

Entry	Date	Note	Proceedings and Orders
1	Dec 18 1991	G	Application (A91-443) to extend the time to file a petition for a writ of certiorari from December 31, 1991 to January 30, 1992, submitted to Justice White.
3	Dec 18 1991		Application for extension of time to file petition and order granting same until January 30, 1992 (White, December 19, 1991).
2	Dec 19 1991		Application (A91-443) granted by Justice White extending the time to file until January 30, 1992.
4	Jan 29 1992	G	Petition for writ of certiorari filed.
5	Mar 4 1992		DISTRIBUTED. March 20, 1992
6	Mar 16 1992	P	Response requested -- BRW. (Due April 16, 1992)
7	Apr 15 1992		Brief of respondent Bruce J. McDermott, et al. in opposition filed.
8	Apr 22 1992		REDISTRIBUTED. May 15, 1992
9	Apr 27 1992	X	Reply brief of petitioner United States/IRS filed.
11	May 18 1992		REDISTRIBUTED. May 22, 1992
12	May 26 1992		Petition GRANTED.
			**********
15	Jul 1 1992		Joint appendix filed.
14	Jul 2 1992		Order extending time to file brief of petitioner on the merits until July 24, 1992.
16	Jul 22 1992		Brief of petitioner United States filed.
19	Aug 17 1992		Record filed.
		*	Certified proceedings U.S. Court of Appeals, Tenth Circuit and U.S. District Court, Central District of Utah.
18	Aug 18 1992		Order extending time to file brief of respondent on the merits until September 4, 1992.
20	Sep 4 1992		Brief of respondents Zions First National Bank filed.
21	Oct 13 1992		SET FOR ARGUMENT MONDAY, DECEMBER 7, 1992. (1ST CASE).
22	Oct 15 1992		CIRCULATED.
23	Dec 7 1992		ARGUED.

No. 91-1229

Supreme Court, U.S.
FILED
JAN 29 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, by and through
INTERNAL REVENUE SERVICE, PETITIONER

v.

BRUCE J. MCDERMOTT and BETTY MCDERMOTT,
and ZIONS FIRST NATIONAL BANK, N.A.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether, under Section 6323(a) of the Internal Revenue Code, 26 U.S.C. 6323(a), a judgment lien of a private creditor that predates a federal tax lien has priority over the tax lien with respect to real property interests acquired by the taxpayer after notice of the tax lien was duly filed.

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In the Supreme Court of the United States

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No.

UNITED STATES OF AMERICA, by and through INTERNAL REVENUE SERVICE, PETITIONER

v.

BRUCE J. MCDERMOTT and BETTY MCDERMOTT, and ZIONS FIRST NATIONAL BANK, N.A.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 945 F.2d 1475. The opinion of the district court (App., *infra*, 16a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 25a-26a) was entered on October 2, 1991. On December 19, 1991, Justice White extended the time for filing a petition for a writ of certiorari to and in-

cluding January 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 6321 of the Internal Revenue Code, 26 U.S.C. 6321, provides:

> LIEN FOR TAXES.
>
> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

2. Section 6323(a) of the Internal Revenue Code, 26 U.S.C. 6323(a), provides:

> VALIDITY AND PRIORITY AGAINST CERTAIN PERSONS
>
> (a) *Purchase[r]s, Holders of Security Interests, Mechanic's Lienors, and Judgment Lien Creditors.*—The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary.

3. Section 301.6323(h)-1(g) of the Treasury Regulations on Procedure and Administration, 26 C.F.R. 301.6323(h)-1(g), provides:

> *Definitions.*
>
> * * * * *

> (g) *Judgment lien creditor.* The term "judgment lien creditor" means a person who has obtained a valid judgment, in a court of record and of competent jurisdiction, for recovery of specifically designated property or for a certain sum of money. In the case of a judgment for the recovery of a certain sum of money, a judgment lien creditor is a person who has perfected a lien under the judgment on the property involved. A judgment lien is not perfected until the identity of the lienor, the property subject to the lien, and the amount of the lien are established. Accordingly, a judgment lien does not include an attachment or garnishment lien until the lien has ripened into judgment, even though under local law the lien of the judgment relates back to an earlier date. If recording or docketing is necessary under local law before a judgment becomes effective against third parties acquiring liens on real property, a judgment lien under such local law is not perfected with respect to real property until the time of such recordation or docketing. If under local law levy or seizure is necessary before a judgment lien becomes effective against third parties acquiring liens on personal property, then a judgment lien under such local law is not perfected until levy or seizure of the personal property involved. The term "judgment" does not include the determination of a quasi-judicial body or of an individual acting in a quasi-judicial capacity such as the action of State taxing authorities.
>
> * * * * *

STATEMENT

1. The Internal Revenue Service (IRS) and Zions First National Bank (Bank) were creditors of Bruce and Betty McDermott. The Bank obtained a state

court judgment for $67,977 against the McDermotts on June 22, 1987, and docketed its judgment in the records of Salt Lake County, Utah, on July 6, 1987. On September 9, 1987, the IRS filed notice of its federal tax lien in the county records. The federal tax lien, in the amount of $103,657, reflected the McDermotts' outstanding federal income tax liabilities for 1977 through 1981 (App., *infra*, 2a-3a, 17a).

On September 23, 1987, after notice of the private and federal liens had both been properly filed, the McDermotts acquired certain real estate located in Salt Lake County (the "South Street property").[1] The McDermotts then resold the property on March 4, 1988. Based upon the liens of record, the IRS and the Bank asserted conflicting claims in the sale proceeds (App., *infra*, 2a-3a, 18a)

2. To resolve the conflicting claims, the McDermotts filed this interpleader action in state court. The United States removed the case to the federal district court, which held that the Bank had the superior claim to the fund (App., *infra*, 16a-24a). The court determined, under Utah law, that the docketing of the Bank's judgment created a lien in its favor only with respect to real property interests and that the McDermotts had no real property interest in the South Street property at the time the judgment was docketed (App., *infra*, 20a). See note 1, *supra*. The district court concluded, however, as a matter of federal law,[2] that the Bank's judgment lien nonetheless had priority as to "all real property then owned and *thereafter* acquired by the McDermotts as of July 6, 1987, the date of docketing" (App., *infra*, 22a). The court concluded that the priority of the liens in *all* real property then held, or thereafter acquired, by the McDermotts should be resolved under the rule of "first in time, first in right" (*ibid.*). Because the federal tax lien was not filed until after the Bank's judgment had been recorded, the district court held that the Bank's judgment lien had priority over the federal tax lien and must be satisfied in full prior to any distribution to the IRS (App., *infra*, 22a-23a).[3]

[1] In 1981, the McDermotts, as fee simple owners of this same property, had entered into a contract of sale with buyers Ron W. Christensen and Gary L. Carter. Upon their entering into this contract, the McDermotts' interest in the property became an interest in personalty under Utah law, although they still retained legal title to the property as security for the purchase price. See *Cannefax* v. *Clement*, 818 P.2d 546 (Utah 1991), aff'g 786 P.2d 1377, 1380 (Utah App. Ct. 1990); *Butler* v. *Wilkinson*, 740 P.2d 1244, 1254 (Utah 1987). On September 23, 1987, after the buyers defaulted, the McDermotts reacquired the property through foreclosure (App., *infra*, 3a-4a, 17a-18a).

[2] The existence and scope of a private lien are determined under state law. The competing priority of the private and federal lien is determined as a matter of federal law. See *United States* v. *City of New Britain*, 347 U.S. 81 (1954); *Texas Oil & Gas Corp.* v. *United States*, 466 F.2d 1040, 1047-1051 (5th Cir. 1972), cert. denied, 410 U.S. 929 (1973).

[3] Even though the government's tax lien attached to all of the McDermotts' real and personal property, including "their sellers' interest in the subject property," the district court viewed this case simply as one involving competing liens in the real property acquired by the McDermotts after both liens had been filed (App., *infra*, 21a, 22a). The court concluded that the government waived any claim based upon the prior attachment of the tax lien to the taxpayers' interest in the sale contract on the propery by stipulating in the escrow agreement that the parties' priorities are to be determined "as they existed against the real property as of September 23, 1987" (App., *infra*, 18a-19a & n.2).

We submit that the district court erred in reaching that conclusion, for the escrow agreement also provides that "[n]ei-

3. The court of appeals affirmed (App., *infra*, 1a-15a). Although noting that this Court has not addressed the particular situation presented in this case —where a judgment lien and a later-filed tax lien give rise to conflicting claims to after-acquired property—the court of appeals nonetheless interpreted *United States* v. *Vermont*, 377 U.S. 351 (1964), to stand for the proposition that a "non-contingent" lien on all of a person's real property that is "perfected prior to the federal tax lien, will take priority over the federal lien, regardless of whether after-acquired property is involved" (App., *infra*, 10a). The court of appeals held that, because the Bank's lien was "non-contingent" (in the sense that the judgment had been properly docketed, was specific in amount, and

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ther party hereto waives any rights, defenses and claims that they may have had * * * in and to the real property, such rights being reserved and shall apply to the cash proceeds being held in escrow in substitution of the subject real property" (App., *infra*, 6a). In our view, this case should have been decided in favor of the United States on the ground that its lien attached to the taxpayers' interest in the property before the taxpayers converted that interest into a real property interest—the only type of interest to which the Bank's lien could have attached. See note 1, *supra*. Under the district court's analysis of the escrow agreement, however, the government's tax lien was not treated as a continuation of its lien against the taxpayers' personalty interest in the contract of sale, but as if it had newly attached to the property only as of the time it was converted into a real property interest. The court of appeals accepted the district court's findings on the interpretation of the escrow agreement (App., *infra*, 6a).

It is, of course, only as a result of the lower courts' interpretation of the escrow agreement that the "after-acquired" property question arises in this case. Since the analysis of the escrow agreement presents narrow issues that lack general importance, however, we do not seek further review of the lower courts' interpretation of that agreement.

was fully enforceable against any real property owned or subsequently acquired by the McDermotts), the Bank's lien had priority even with respect to property first acquired by the McDermotts after the federal tax lien had been perfected (App., *infra*, 11a-13a).[4]

REASONS FOR GRANTING THE PETITION

The court of appeals held that a judgment creditor's claim has priority over a subsequently filed federal tax lien even for real property acquired by the taxpayer *after* notice of the federal tax lien was properly filed. This holding is squarely in conflict with the decision of the Iowa Supreme Court in *Iowa Fair Plan* v. *United States*, 257 N.W.2d 626, 629 (1977), and also conflicts with the reasoning of *MDC Leasing Corp.* v. *New York Property Insurance Underwriting Association*, 450 F. Supp. 179 (S.D.N.Y. 1978), aff'd per curiam, 603 F.2d 213 (2d Cir. 1979); *United States* v. *Graham*, 96 F. Supp. 318 (S.D. Cal. 1951), aff'd *sub nom. California* v. *United States*, 195 F.2d 530 (9th Cir.), cert. denied, 344 U.S. 831 (1952); and *Southern Rock, Inc.* v. *B & B Auto Supply*, 711 F.2d 683 (5th Cir. 1983).

The issue presented in this case is of signficant, recurring administrative importance, for it affects many thousands of federal tax liens competing with judgment creditor claims to property acquired after the liens have been perfected. In the absence of an

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[4] The court of appeals also rejected (App., *infra*, 13a-14a) the government's alternative argument, based on the Fifth Circuit's decision in *Southern Rock, Inc.* v. *B & B Auto Supply*, 711 F.2d 683 (1983), that, even if the tax lien is not entitled to priority, the Bank and the IRS should be viewed as creditors with simultaneously attaching liens in the South Street property and should share *pro rata* in the fund generated by that property.

authoritative decision from this Court, the continuing uncertainty resulting from the disparate decisions of the lower courts will generate further litigation and will cause both lien claimants and taxpayers to receive uneven treatment based solely on the happenstance of their geographical location.

1. Section 6321 of the Internal Revenue Code grants the United States a lien "upon all property and rights to property, whether real or personal" belonging to a taxpayer who, after demand, fails to pay taxes owed to the United States. 26 U.S.C. 6321. Although this lien generally enjoys a high priority under federal law, Section 6323(a) of the Internal Revenue Code provides that the federal tax lien "shall not be valid" against certain secured creditors, including a "judgment lien creditor," until notice of the federal lien is properly filed. 26 U.S.C. 6323(a).

In the present case, the following facts were not disputed (App., *infra*, 2a-3a): (i) the Bank possesses a valid judgment lien under state law in real property owned by the taxpayers; (ii) the United States possesses a valid tax lien under Section 6321 of the Internal Revenue Code in all property and rights to property of the taxpayers; (iii) the Bank properly filed notice of its lien before the United States filed notice of its lien; and (iv) the real property to which these liens now apply was acquired by the taxpayers *after* both the judgment lien and tax lien had been properly filed. Based upon these undisputed facts, the court of appeals erred in concluding that the federal tax lien was not entitled to priority in this case.

a. In a case involving exactly these same circumstances, the Supreme Court of Iowa held in *Iowa Fair Plan* v. *United States*, 257 N.W.2d 626 (1977), that the later-filed federal tax lien has priority as a matter

of federal law in the after-acquired property of the taxpayer. As the Iowa court observed (*id.* at 629), the decisions of this Court have established that a first-filed private lien has priority over a later-filed federal tax lien only if the private lien has "attached to the property in question and bec[o]me choate" before the federal lien is filed. *United States* v. *Pioneer American Insurance Co.*, 374 U.S. 84, 88 (1963) (quoting *United States* v. *City of New Britain*, 347 U.S. 81, 86 (1954)). For a private lien to be "choate" under these decisions, it must specify "the identity of the lienor, the property subject to the lien, and the amount of the lien" (347 U.S. at 84).[5] Since a property right must "exist before the lien attaches to it," a private lien is necessarily "inchoate as to property rights which have not yet arisen." *Iowa Fair Plan* v. *United States*, 257 N.W.2d at 629. When the property right first comes into existence after both the private and federal liens have been filed, the preexisting liens then "attach immediately to the new property" (*ibid.*). As the result (*id.* at 629-630),

> [t]he liens become choate in the new property interest at the same time. Because the state lien did not become choate before the federal lien, the federal lien has priority * * *.

In *United States* v. *Graham*, 96 F. Supp. 318, 321 (S.D. Cal. 1951), aff'd *sub nom. California* v. *United States*, 195 F.2d 530 (9th Cir.), cert. denied, 344 U.S. 831 (1952), and in *MDC Leasing* v. *New York Property Insurance Underwriting Association*, 450 F. Supp.

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[5] Treasury regulations elaborate this principle by specifying that a "judgment lien is not perfected until the identity of the lienor, the property subject to the lien, and the amount of the lien are established." 26 C.F.R. 301.6323(h)-1(g).

179, 181 (S.D.N.Y. 1978), aff'd per curiam, 603 F.2d 213 (2d Cir. 1979), the courts reached the same conclusion that, when the federal tax lien and the private lien attach to the property at the same time, regardless which lien was *filed* first, the federal lien prevails. As the court held in *MDC Leasing* (450 F. Supp. at 181):

> [a] federal tax lien takes priority over competing liens unless the competing lien was choate prior to the attachment of the federal lien * * *.

b. The court of appeals reached a different conclusion in this case. Relying on *United States* v. *Vermont*, 377 U.S. 351 (1964)—which held that a state lien in "all" of the taxpayer's property sufficiently identifies the "property subject to the lien" to be "choate" as required by the *City of New Britain* case (377 U.S. at 354, 358-359)—the court of appeals concluded that the judgment lien in the taxpayers' real property was "choate" even as to real property the taxpayer did not own but later acquired (App., *infra*, 10a).[5] Since, the court reasoned, the judgment lien

[5] The court of appeals cited *Wisconsin* v. *Bar Coat Blacktop, Inc.*, 640 F. Supp. 407, 414 (W.D. Wis. 1986), *McAllen State Bank* v. *Saenz*, 561 F. Supp. 636, 639 (S.D. Tex. 1982), and *United States* v. *Fleming*, 474 F. Supp. 904, 906 (S.D.N.Y. 1979), as cases that reached the same interpretation of *United States* v. *Vermont*, *supra*. See App., *infra*, 11a-12a. Those three district court decisions cite *United States* v. *Vermont* for the conclusion that a general lien on "all" of a debtor's property is sufficiently specific to satisfy the requirement of *United States* v. *City of New Britain*, 347 U.S. at 86, that the lien must specifically identify the property to which it applies. See 640 F. Supp. at 414; 561 F. Supp. at 639; 474 F. Supp. at 906. None of these decisions, however, relies on *United States* v. *Vermont* for the proposition that a judgment lien has priority over a later-filed tax lien for property acquired after the tax lien is filed. Moreover, the present case does not involve a general judgment lien on "all" of the debtor's property; instead, this case concerns a judgment lien only in "real property" owned by the debtor (App., *infra*, 20a).

was "choate" before the federal tax lien was filed, the judgment lien has priority "regardless of whether after-acquired property is involved" (*ibid.*). The court of appeals noted (App., *infra*, 12a) that a similar conclusion was reached in *Wisconsin* v. *Bar Coat Blacktop, Inc.*, 640 F. Supp. 407 (W.D. Wis. 1986), where the court held that a first-filed lien that applies to "all" of a taxpayer's property has priority over a later-filed federal tax lien even as to property acquired after the tax lien is filed (*id.* at 415). See also *McAllen State Bank* v. *Saenz*, 561 F. Supp. 636 (S.D. Tex. 1982).

The court of appeals erred in its analysis in this case. A lien cannot be "choate" in property that does not belong to the taxpayer for the simple reason that, if the taxpayer does not own the property, the lien does not attach to it. It is only when the taxpayer acquires the property that the lien can attach and thereby become choate. *Iowa Fair Plan* v. *United States*, 257 N.W.2d at 629. See *Texas Oil & Gas Corp.* v. *United States*, 466 F.2d at 1048; *MDC Leasing* v. *New York Property Insurance Underwriting*, 450 F. Supp. at 181. It is only when the new property is acquired that the "property subject" to the lien is identified and the lien becomes choate (*United States* v. *City of New Britain*, 347 U.S. at 86).

Nothing in this Court's decision in *United States* v. *Vermont* supports the court of appeals' conclusion that a lien is "choate" in property that a taxpayer does not own. In *Vermont*, this Court did not address

whether the State's lien could attach to property that the taxpayer did not own; instead, that case concerned only whether a state lien in "all" the debtor's property sufficiently identified the debtor's bank accounts as "property subject to the lien" and therefore satisfied the "choateness" requirement of *United States* v. *City of New Britain*. See 377 U.S. at 354-355. The Court held in the *Vermont* case that the word "all" sufficiently describes the property to which it applies and that the State's lien was therefore "choate" as applied to the debtor's existing bank accounts. *Id.* at 355-358. In holding that the word "all" sufficiently described the property owned by the debtor, the Court did not hold that a lien can be choate in property that the taxpayer does *not* own. Nor is there any logical relationship between these two separate issues.

c. Other courts have adopted a still different analysis of this same issue. In *Southern Rock, Inc.* v. *B & B Auto Supply*, 711 F.2d 683 (1983), the Fifth Circuit held that when, as in the present case, a private lien and a federal tax lien attach to the same property at the same time, the competing lienors must share the proceeds of the property "in proportion to their claims." *Id.* at 689. In so holding, the court stated that the "notion that a tie goes to the government" is incorrect. *Ibid.*

Similarly, *United States* v. *Fleming*, 474 F. Supp. 904, 908 (S.D.N.Y. 1979), held that, when the federal and private liens attach to newly-acquired property simultaneously, there must be a pro rata sharing of the proceeds of the property. The court explained that this result flows from analogous state "common law" practices (*ibid.*):

> As to property of the debtor in existence at the time the liens arose, the common-law rule is "the first in time is the first in right." [*United States* v. *City of New Britain*,] 347 U.S. at 85. As to after-acquired property, the rule is that judgment liens in existence when the debtor acquired the property are to be satisfied *pro rata* out of that property.

It is, of course, well established that federal law, rather than state common law, determines the priority of federal tax liens. See *United States* v. *Gilbert Associates, Inc.*, 345 U.S. 361, 364-365 (1953). Moreover, contrary to the conclusion reached by the courts in *Southern Rock* and *Fleming*, the established federal rule is that, unless the private lien becomes choate in the specific property in dispute before the federal lien is filed, the federal lien has "priority" not "parity." *Texas Oil & Gas Corp.* v. *United States*, 466 F.2d at 1047, 1052. See *MDC Leasing* v. *New York Property Insurance Underwriting*, 450 F. Supp. at 181.

2. The courts that have considered the question presented in this case have reached irreconcilably inconsistent conclusions. Depending upon the forum in which the issue is presented, when a private lien is filed before notice of a federal tax lien is filed, one of the following results will transpire: (i) the private lien will have priority in after-acquired property (*e.g.* App., *infra*, 12a-13a); (ii) the federal tax lien will have priority in after-acquired property (*e.g.*, *Iowa Fair Plan* v. *United States*, 257 N.W.2d at 629); or (iii) the private lien and the federal tax lien will share *pro rata* in the after-acquired property (*e.g.*, *United States* v. *Fleming*, 474 F. Supp. at 908). The conflict created by these widely disparate decisions can be resolved only by this Court.

The inconsistent treatment for lien priorities that results from the conflicting lower court decisions

creates significant confusion in the determination of creditors' rights. The question presented in this case is a commonly recurring one with substantial administrative importance. The disparate treatment afforded to creditors under these mixed decisions also has significant consequences for taxpayers, for unfulfilled tax obligations can have meaningfully different consequences for taxpayers than unfulfilled obligations to other types of creditors.

In the absence of a decision from this Court, the priority afforded a federal tax lien—and the consequent unfulfilled tax obligations of debtors—will vary depending solely upon the forum in which the issue is presented. Resolution of this recurring issue by this Court is needed to avoid continuing uncertainty and inconsistent application of the revenue laws.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1992

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 90-4023

BRUCE J. MCDERMOTT and BETTY MCDERMOTT,
PLAINTIFFS

v.

ZIONS FIRST NATIONAL BANK, N.A.,
DEFENDANT-APPELLEE

UNITED STATES OF AMERICA, by and through
INTERNAL REVENUE SERVICE, DEFENDANT-APPELLANT

On Appeal from the United States District Court
for the District of Utah
(D.C. No. 88-C-0399G)

[Filed Oct. 2, 1991]

Before TACHA and SETH, Circuit Judges, and BRATTON, District Judge.*

BRATTON, District Judge.

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* Howard C. Bratton, Senior District Judge of the United States District Court for the District of New Mexico, sitting by designation.

Plaintiffs, Bruce and Betty McDermott, brought this interpleader action to determine priority in the proceeds of a sale of real property. Zions First National Bank (Zions) claims a lien arising out of a judgment by a Utah state court against the McDermotts. The competing lien of the United States is a federal tax lien claimed by the Internal Revenue Service on behalf of the United States (IRS). Both parties moved for summary judgment, and the district court granted summary judgment in favor of Zions. The IRS has appealed; we affirm.

I.

Zions obtained its judgment for $67,977.67 against the McDermotts on June 22, 1987, and properly docketed the judgment in Salt Lake County on July 6, 1987. The lien attached to all of the McDermotts' real property and after-acquired property located in the county.[1] The IRS filed its Notice of Federal Tax Lien on September 9, 1987. Its lien attached to all of the McDermotts' owned and after-acquired real and personal property.[2] On September 23, 1987, the

[1] The relevant portion of the Utah statute provides:

> From the time the judgment of the district court or circuit court is docketed and filed in the office of the clerk of the district court of the county it becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in the county in which the judgment is entered, owned by him at the time or by him thereafter acquired during the existence of said lien.

Utah Code Ann. § 78-22-1 (1953).

[2] The federal tax lien is a "lien in favor of the United States upon all property and right to property, whether real or personal, belonging to such person." 26 U.S.C. § 6321 (1954). The lien also applies to after-acquired property. *Glass City Bank v. United States*, 326 U.S. 265 (1945) (interpreting

McDermotts acquired title to certain real property in Salt Lake County to which they already had a buyer, Bob Hansen. There is no evidence in the record that either Zions or the IRS attempted to execute on its lien prior to this time. However, in order to obtain title insurance for the property and complete the sale to Mr. Hansen, the title insurance company required the McDermotts to obtain releases from Zions and the IRS.

Accordingly, the parties entered into an escrow agreement in which Zions and the IRS released their claims to the real property itself but reserved their rights to the cash proceeds of the sale. In the agreement, the parties addressed the issue of priority by providing:

> The respective priorities of the parties to the cash proceeds shall be identical to the priorities of the respective liens of the parties as they existed against the real property as of September 23, 1987, after Bruce J. McDermott successfully bid and purchased the property at the Trustee's Sale, notwithstanding the change in form of the collateral.

The agreement also required the McDermotts to institute this interpleader action so that a court could determine who was entitled to priority in the net proceeds.[3]

The McDermotts were not strangers to the property they acquired. In 1981 they had entered into

Section 3670 of the Internal Revenue Code, the predecessor of 26 U.S.C. § 6321).

[3] The McDermotts originally brought the action in state court. The United States removed to federal court pursuant to 28 U.S.C. § 1442(a)(1). We have jurisdiction pursuant to 28 U.S.C. § 1291.

a Uniform Real Estate Contract (UREC) to sell this property to Ron Christensen and Gary Carter (C & C). Pursuant to the terms of the UREC, C & C paid $191,000.00 cash to the McDermotts and agreed to pay the balance of the purchase price monthly. The McDermotts accepted from C & C a Trust Deed Note in the amount of $146,000.00 and a Trust Deed securing the Note with C & C's interest in the property and C & C's interest was conveyed to the Trustee. Legal title to the property, however, remained with the McDermotts.[4]

C&C defaulted on their obligations under the Trust Deed Note in early 1986. Befoer the Trustee could hold a sale of the property, C & C assigned their interest in the UREC to C & C Investments. C & C Investments subsequently filed a petition for bankruptcy, and a pending sale was stayed. During the bankruptcy proceedings, the McDermotts gave C & C time to find a buyer for the property and, as consideration, released their interest in the UREC. C & C did not find a buyer, and by August 1987 the McDermotts succeeded in getting the property released from the bankruptcy estate and the Trustee noticed the sale. The McDermotts repurchased the property at the sale by submitting a credit bid and assuming an underlying mortgage.

II.

The district court held that Zions had priority because its lien was filed "first in time." The court applied the "first in time, first in right" rule after

[4] Under the doctrine of equitable conversion, a real estate contract acts to transfer equitable title to real estate to the buyer, while legal title remains with the seller. *Butler v. Wilkinson*, 740 P.2d 1244, 1255 n.5 (Utah 1987).

finding that the liens simultaneously attached to the real property on September 23, 1987. In addition, the court found that in the Escrow Agreement the IRS waived any interest it might have had in the UREC as personalty and the proceeds of that personalty. The court assumed, but did not decide, that the IRS lien had attached to the McDermotts' interest in the real estate contract and that Zions' lien did not.

We review a grant of summary judgment by examining the record to determine whether there are any remaining genuine issues of material fact and whether the district court correctly applied the substantive law. We will affirm if any proper ground exists to support the district court's decision. *United States v. State of Colo.*, 872 F.2d 338, 339 (10th Cir. 1989); *Setliff v. Memorial Hosp. of Sheridan County*, 850 F.2d 1384, 1391-92 (10th Cir. 1988). Our review is *de novo*. *Croft v. Harder*, 927 F.2d 1163, 1164 (10th Cir. 1991). In this case there are no facts in dispute and we find that the district court was correct that Zion's lien had priority over the IRS lien. However, as we explain in Part IIIB of this opinion, we differ from the district court in that we apply Congressional and regulatory directive, rather than the common law rule of "first in time, first in right."

III.

In this appeal, the IRS argues it did not waive its claim to the McDermotts' interest in the UREC and therefore it should have priority because its lien attached to the UREC before Zions' lien attached to the real property. In the alternative, the IRS argues it has priority because Zions' lien was not "choate" at the time the IRS filed its Notice of Tax Lien as the McDermotts did not yet own the real property at issue. Finally, the IRS claims that, if nothing else, it

should share pro-rata in the fund. We will address each argument in turn.

A.

The Escrow Agreement provided that

> "[t]he monies placed in escrow shall be in lieu of all legal and equitable rights of the IRS and Zions to the real property releases [sic] by them as part of this agreement. Neither party hereto waives any rights, defenses and claims that they may have had or any of them may have had in any interest in and to the real property, such rights being reserved and shall apply to the cash proceeds being held in escrow in substitution of the subject real property."

The construction of a contract is a question of law for the court. *Resort Car Rental System, Inc. v. Chuck Ruwart Chevrolet, Inc.*, 519 F.2d 317, 320 (10th Cir. 1975). We agree with the district court that the plain language of the agreement shows that both Zions and the IRS intended to attach their liens to a particular piece of real property, the subject of the sale to Mr. Hanson.[5]

[5] Whatever interest in real or personal property the McDermotts had prior to September 23, 1987, was not crucial to the decision below, and we do not make that decision here. The district court based its ruling on the fact that the parties entered an agreement indicating that their liens would attach to particular real property owned by the McDermotts after September 23, 1987. We do note, however, that prior to a 1990 decision of the Utah Court of Appeals, now pending on certiorari in the Utah Supreme Court and contrary to the district court's assumption, it was not clear in Utah whether or not a judgment lien could attach to a vendor's interest in a real estate contract. In *Cannefax v. Clement*, 786 P.2d 1377 (Utah App.), *cert. granted*, 795 P.2d 1138 (1990), the Utah Court of Appeals held for the first time in Utah that a vendor in a real estate contract had no property rights to which a state judgment lien could attach. The dissent in *Cannefax* disagreed with the majority and referred to a statement in an earlier Utah Supreme Court opinion indicating that a judgment lien could attach to a vendor's interest in a real estate contract. *Id.* at 1383-91 (Bullock, J. dissenting) (quoting *Butler v. Wilkinson*, 740 P.2d 1244, 1258 (Utah 1987)). The district court's decision is dated January 17, 1989, prior to *Cannefax*. Furthermore, the McDermotts appear to have released their interest in the UREC during the bankruptcy proceedings. Of course, the federal lien may have also attached to the McDermotts' beneficial interest in the Trust Deed, but that point has never been argued by the IRS.

B.

Often, the first question to be addressed in a case involving priority of a federal tax lien is whether or not the taxpayer has rights in particular property to which the federal lien could attach. That question is resolved by state law. *See, e.g., Aquilino v. United States*, 363 U.S. 509, 512-13 (1960); *Bigheart Pipeline Corp. v. United States*, 835 F.2d 766, 767 (10th Cir. 1987). However, in this case the parties removed the state law issue of property rights by implicitly agreeing in the Escrow Agreement that their lien would attach to certain real property owned by the McDermotts. Accordingly, the only issue remaining is the priority of the two competing liens.

Federal law determines priority between federal tax liens and state-created liens. *United States v. Equitable Life Assurance Soc'y of the U.S.*, 384 U.S. 323, 328 (1966); *Allan v. Diamond T Motor Car Co.*, 291 F.2d 115, 116 (10th Cir. 1961). Under federal law, judgment lien creditors are among certain creditors who have priority over federal tax liens when their liens are fully perfected and "choate"

prior to the filing of the federal government's Notice of Tax Lien. 26 U.S.C. § 6323(a); 26 C.F.R. § 301.6323(h)-1(g); *see also United States v. Pioneer Am. Ins. Co.*, 374 U.S. 84, 89 (1963). All other creditors have priority over federal tax liens if their liens were fully perfected and choate before the federal tax lien arose at the time of assessment. *United States v. City of New Britain*, 347 U.S. 81, 85-86 (1954); 28 U.S.C. § 6322.[6]

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[6] Congress has accorded judgment creditors priority over unfiled tax liens since 1913. Act of March 4, 1913, ch. 166, 37 Stat. 1016. Prior to this law, federal tax liens, which arise upon assessment, were secret liens that prevailed over all other subsequent creditors. *See generally* Plumb, Federal Liens and Priorities—Agenda for the Next Decade, 77 Yale L.J. 228, 229 (1967). The original priority statute protected purchasers, mortgages and judgment creditors. In 1939, the statute was amended to include pledgees. Revenue Act of 1939, § 401, 53 Stat. 882. The current statute, enacted in 1966, protects purchasers, holders of security interests, mechanic's lienors, and judgment lien creditors. The statute provides: "The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary." 26 U.S.C. 6323(a) (1966).

The Supreme Court originated the doctrine of "choate" liens in *Spokane County v. United States*, 279 U.S. 80 (1929), in the context of priority of liens where the debtor was insolvent. The Court extended the doctrine in *United States v. Security Trust & Sav. Bank, Executor*, 340 U.S. 47 (1950), to priority contests between federal tax liens and liens not named in the priority statute recited above, where the debtor was solvent. Finally in *United States v. Pioneer Am. Ins. Co.*, 374 U.S. 84 (1963), the Court held that liens mentioned in the priority statute also needed to be choate in order to prime a filed federal tax lien. *See generally* Kennedy, *From Spokane*

Whether or not a lien is choate is a federal question. *United States v. Security & Sav. Bank, Executor*, 340 U.S. 47, 49-50 (1950). For a prior lien on *all* of a person's real or personal property to take priority over a federal tax lien, the lien must be "perfected in the sense that there is nothing more to be done to have a choate lien—when the identity of the lienor, the property subject to the lien, and the amount of the lien are established." *City of New Britain*, 347 U.S. at 84; *see also United States v. Vermont*, 377 U.S. 351 (1964).

The Treasury Department has incorporated the judicially-created "choateness" doctrine into its definition of "judgment lien creditor" for purposes of 25 U.S.C. § 6323(a).

> The term "judgment lien creditor" means a person who has obtained a valid judgment, in a court of record and of competent jurisdiction, for the recovery of specifically designated property or for a certain sum of money. In the case of a judgment for the recovery of a certain sum of money, a judgment lien creditor is a person who has perfected a lien under the judgment on the property involved. *A judgment lien is not perfected until the identity of the lienor, the property subject to the lien, and the amount of the lien are established.* Accordingly, a judgment lien does not include an attachment or garnishment lien until the lien has ripened into judg-

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County to Vermont: The Campaign of the Federal Government Against the Inchoate Lien, 50 Iowa L. Rev. 724 (1965).

In the Federal Tax Lien Act of 1966, Congress specifically altered the choateness doctrine with respect to certain transactions. *See* 26 U.S.C. 6323(b)-(e); *Donald v. Madison Indus., Inc.*, 483 F.2d 837, 840 (10th Cir. 1973).

ment, even though under local law the lien of the judgment relates back to an earlier date. If recording or docketing is necessary under local law before a judgment becomes effective against third parties acquiring liens on real property, a judgment lien under such local law is not perfected with respect to real property until the time of such recordation or docketing. If under local law levy or seizure is necessary before a judgment lien becomes effective against third parties acquiring liens on personal property, then a judgment lien under such local law is not perfected until levy or seizure of the personal property involved. The term "judgment" does not include the determination of a quasi-judicial body or of an individual acting in a quasi-judicial capacity such as the action of State taxing authorities.

See 26 C.F.R. § 301.6323(h)-1(g) (emphasis added). *Cf. United States v. Acri*, 348 U.S. 211 (1955) (attachment lien not choate because fact and amount of lien contingent); *Security Trust*, 340 U.S. at 50 (attachment lien "merely a *lis pendens* notice that a right to perfect a lien exists").

The IRS does not argue that Zions' lien falls within any of the exceptions noted in the regulation other than that at the time the IRS filed its notice "the property subject to the lien had not been established." Although the Supreme Court has not addressed this particular situation—where the IRS and the judgment creditor are clearly claiming after-acquired property, we believe that *United States v. Vermont*, 377 U.S. 351 (1964), stands for the proposition that a non-contingent, or choate, lien on all of a person's real property, perfected prior to the federal tax lien, will take priority over the federal lien, regardless of whether after-acquired property is involved.

In *United States v. Vermont*, Vermont and the United States held almost identical tax liens, arising upon assessment, upon all the taxpayer's real and personal property. Vermont's lien arose October 21, 1958, and the federal lien arose February 9, 1959. After the federal lien arose, Vermont attempted to reach certain funds owing to the taxpayer and held by a bank.[7] *Id.* at 352-53. The United States argued, as it argues here thirty years later, that a state-created lien had to attach to specific property in order for it to take priority. *See id.* at 355. The Supreme Court, while noting that the federal lien would take priority if the debtor were insolvent,[8] ruled that because Congress provided no special rules for priority of tax liens arising under section 6321, the basic rule of "first in time, first in right" would apply. *Id.* at 357-58. The Court went on to hold that even though both liens were general, both were equally perfected as to all the taxpayer's property and were choate. *Id.* at 358-59. Therefore, when both governments attempted to satisfy their liens with the same property,

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[7] Because the state lien was not one mentioned in 26 U.S.C. § 6323, the Court determined the federal priority by the date of assessment and demand, not by the date of notice filing. *United States v. Vermont*, 377 U.S. at 353 n.3.

[8] The federal government had absolute priority in situations where the debtor was insolvent and his property was in the hands of a receiver. Rev. Stat. § 3466, 31 U.S.C. § 191 (R.S. 3466). For any prior creditor to take priority he would have had to attach specific property, reduce it to possession, and have it removed from the control of the receiver. *See United States v. City of New Britain*, 347 U.S. 81, 85 (1954); *United States v. Gilbert Assoc., Inc.*, 345 U.S. 361 (1953). It was in the context of R.S. 3466 that the Supreme Court originated the choateness rules. See footnote 6.

the government whose lien arose first, Vermont, would take priority. *Id.* at 354, 359.

Just as Vermont's lien was choate and entitled to priority, Zions' lien was choate and entitled to priority. Zions' lien was not contingent, it was docketed, specific in amount, and fully enforceable against any real property owned by the McDermotts in Salt Lake County during the pendency of the lien. We agree with the cases cited by Zions interpreting *Vermont* to apply to property acquired by the debtor after perfection of the lien as well as to property owned by the debtor at the time the lien was perfected. *See State of Wis. v. Bar Coat Blacktop, Inc.*, 640 F. Supp. 407, 414 (W.D. Wis. 1986); *McAllen State Bank v. Saenz*, 561 F. Supp. 636, 639 (S.D. Tex. 1982); *United States v. Fleming*, 474 F. Supp. 904, 906 (S.D.N.Y. 1979). *See also* Plumb, Federal Tax Liens 134-35 (3d ed. 1972) ("the typical general judgment lien on 'all' the debtor's real property seems safe from later tax liens").

The IRS has not referred us to any federal authority for the rule it proposes. The only court of appeals case cited by the IRS, *MDC Leasing Corp. v. New York Property Insurance Underwriting Assoc.*, affirms a district court opinion holding that an assignment of insurance proceeds not reduced to judgment is not sufficiently choate to prime a federal tax lien. 603 F.2d 213 (2d Cir. 1979), *aff'g without opinion* 450 F. Supp. 179 (S.D.N.Y. 1978). The district court, in dictum, had stated that because the liens attached simultaneously to the after-acquired proceeds the federal tax lien would take priority. *MDC Leasing Corp.*, 450 F. Supp. at 181. The authority for that proposition was *United States v. Graham*, 96 F. Supp. 318 (S.D. Cal. 1951), *aff'd sub nom. State of California v. United States*, 195 F.2d 530 (9th Cir.), *cert. denied*, 344 U.S. 831 (1952). The *Graham* holding rested on the fact that the state's right to set-off was not choate and could not prime the federal tax lien. Again in dictum, the court stated without citing to any authority that federal liens are superior to simultaneously attaching interests. *Id.* at 321. The dicta from these cases do not support the general proposition that a federal tax lien has priority over a fully choate judgment lien when both liens seek to reach property acquired after the perfection of each lien.

In sum, although the district court's result was correct, we believe the problem is more properly analyzed under the federal priority statute, 26 U.S.C. § 6323(a), the Treasury Department's definition of "judgment lien creditor" found at 26 C.F.R. § 301.6323(h)-1(g), and the Supreme Court's definition of a choate lien. There was no need to resort to the federal common law rule of "first-in-time, first-in-right," because Congress has made clear in section 6323(a) and its predecessors that judgment lien creditors who perfect their liens before the filing of a federal tax lien have priority.

C.

Finally, the IRS presents *Southern Rock, Inc. v. B & B Auto Supply*, 711 F.2d 683 (5th Cir. 1983), as authority for its suggestion that it share pro-rata in the proceeds with Zions. *Southern Rock* involved two liens which were *perfected* simultaneously. The IRS and the secured creditor filed their notice and financing statement at exactly the same time. *Id.* at 684. Because the court could find no cases involving simultaneous perfection (as opposed to simultaneous attachment), the court applied the common law and

let the two claimants share pro-rata in a fund consisting of proceeds from accounts receivable. *Id.* at 689. Accordingly, *Southern Rock* is not precedent for us to ignore the clear priority of Zions' judgment lien.

In *United States v. Fleming*, 474 F. Supp. 904 (S.D.N.Y. 1979), the court was presented with competing city, state, and federal tax liens seeking to reach after-acquired personal property (gold coins). After finding that the non-federal liens were indeed choate, *id.* at 906, the court incorrectly looked to state law and held that the proceeds of the sale of the coins should be distributed pro-rata between the claimants. *See id.* at 908. However, the law is clear that once a taxpayer's rights in property are determined, the consequences which flow from those rights are to be determined by federal law. *Aquilino v. United States*, 363 U.S. 509 (1960); *United States v. Cache Valley Bank*, 866 F.2d 1242, 1244 (10th Cir. 1989). The federal law is either the common law rule "first in time, first in right," *City of New Britain*, 347 U.S. 81, 85 (1953), or the statutory rule found in 26 U.S.C. § 6323.[9]

IV.

We realize the importance of the federal government's and indeed the entire citizenry's interest in collecting our taxes. However, "[t]he purpose of

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[9] The IRS includes the *Fleming* case in its brief, but not to show that the proceeds should be divided pro-rata. Instead, the IRS tells us that *Fleming*'s holding that the local liens were choate should be disregarded because the court erred in relying on state law. We note that the court correctly relied on *United States v. Vermont* to find that the liens were indeed choate and erred only in applying state law to the priority question.

[section 6323(a)] is to prevent secret tax liens from being effective against named classes of claimants to a delinquent taxpayer's property." *Marteney v. United States*, 245 F.2d 135, 140 (10th Cir. 1957). The federal tax lien in this case was "secret" on July 6, 1987, when Zions became a judgment lien creditor entitled to the protection of section 6323(a). Zions' lien was perfected and choate within the meaning of the statute, the regulation, and the case law as to all the McDermotts' real property. Accordingly, the IRS lien was not "valid" as to Zions' judgment lien.

The judgment of the United States District Court for the District of Utah is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH—CENTRAL DIVISION

Civil No. 88-C-0399G

BRUCE J. MCDERMOTT, ET AL., PLAINTIFFS

vs.

ZIONS FIRST NATIONAL BANK, N.A., ET AL.,
DEFENDANTS

MEMORANDUM DECISION AND ORDER

[Filed Jan. 17, 1989]

This matter came before the court on December 1, 1988 pursuant to the parties' respective cross Motions for Summary Judgment. The United States was represented by Kirk C. Lusty, and Zions First National Bank ("Zions Bank") was represented by T. Richard Davis. Counsel submitted legal memoranda and presented oral argument. The court took the matter under advisement but allowed the parties to file supplemental memoranda without further argument, which memoranda were filed on December

22, 1988. Being now fully advised, the court enters its Memorandum Decision and Order.

FACTUAL BACKGROUND

This interpleader action originally was brought in state court, but subsequently was removed by the United States to this court pursuant to 28 U.S.C. § 1442(a)(1). The case involves the determination of the relative priorities of a federal tax lien and a judgment lien to the proceeds from the sale of certain real property to which the liens purportedly attach.

On August 21, 1981, the McDermotts, as the fee simple owners of certain real property located in Salt Lake City, Utah, entered into a Uniform Real Estate Contract with Ron W. Christensen and Gary L. Carter ("buyers") for the sale of that property by the McDermotts. On the same date, the McDermotts accepted from the buyers a Trust Deed Note in the amount of $146,000.00 and a Trust Deed on the property securing the Note with the buyers' interest in the property, notwithstanding the fact that legal title to the property remained vested in the McDermotts.

On June 22, 1987, a judgment was entered in the Third Judicial District Court of Salt Lake County, State of Utah, against Bruce McDermott and in favor of Zions Bank in the amount of $67,977.67 together with post-judgment interest and attorneys fees, which judgment was docketed on July 6, 1987. On September 9, 1987, the Internal Revenue Service ("IRS") filed a Notice of Federal Tax Lien with the Salt Lake County Recorder's Office alleging that the McDermotts have an unpaid tax liability to the government in the amount of $103,657.93. On September 23, 1987, after the buyers had defaulted on their payment obligations under the Trust Deed Note, the McDermotts commenced a power of sale foreclosure on

the property as authorized by the Trust Deed. The high bidder at the Trustee's sale was Bruce McDermott, who purchased the property with a bid of $305,074.63, which included assumption of the underlying obligation of $119,950.00 and a credit bid of $185,124.63 as against the defaulted Trust Deed Note.

On March 4, 1988, the McDermotts sold the property to Robert R. Hansen and Helen A. Hansen (the "Hansens"). In connection with that sale, the parties to this lawsuit entered into an Earnest Money Agreement under which the net proceeds of the sale totaling $135,575.50 were paid to the clerk of this court in contemplation of this interpleader action pursuant to the terms of an Escrow Agreement.[1] The Escrow Agreement also provides that the proceeds on deposit shall be distributed in accordance with the priorities of the parties' respective liens as they existed against the real property on September 23, 1987, the date Bruce McDermott reacquired the property at the Trustee's sale.[2]

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[1] ¶ 7 of the Escrow Agreement provides:

> Escrow Agent shall hold all case proceeds after payment of the items set forth in paragraph 2 herein until presented with an Order of the United States District Court directing the payment of said proceeds to the Clerk of the United States District Court or other designated party. An interpleader action shall be filed with the United States District Court by McDermott immediately after all terms of paragraph 6 of this Agreement have been satisfied.

[2] ¶ 3 of the Escrow Agreement provides:

> It is understood that the releases delivered herewith by the IRS and Zions are unconditional. *The monies placed in escrow shall be in lieu of all legal and equitable rights of the IRS and Zions to the real property releases by them as part of this agreement.* Neither party hereto waives any rights, defenses and claims that they may have had or any of them may have had in any interest in and to the real property, such rights being reserved and shall apply to the cash proceeds being held in escrow in substitution of the subject real property. *The respective priorities of the parties to the cash proceeds shall be identical to the priorities of the respective liens as they existed against the real property as of September 23, 1987, after Bruce J. McDermott successfully bid and purchased the property at the Trustee's Sale,* notwithstanding the change in form of collateral.

(Emphasis added.)

ANALYSIS

In determining the relative priority of federal tax liens and the liens of third parties asserted against a taxpayer's property, the court is confronted with two questions. First, "whether and to what extent the taxpayer had 'property' or 'rights to property' to which the tax lien could attach. *Aquilino v. United States*, 363 U.S. 509, 512 (1960). In resolving that question, the court "must look to state law." *Id.* at 512-13; *Tillery v. Parks*, 630 F.2d 775, 776 (10th Cir. 1980). The second question involves the rights of the parties to the property, which is answered by reference to federal law. *See United States v. Equitable Life Assur. Co.*, 384 U.S. 323, 330 (1966); *Aquilino*, 363 U.S. at 513-14; *United States v. Hershberger*, 475 F.2d 677, 681-82 (10th Cir. 1973).

I. NATURE OF PROPERTY RIGHTS RETAINED BY SELLER UNDER CONTRACT TO SELL REAL PROPERTY

Turning to the first question, when the McDermotts entered into the Uniform Real Estate Contract with the buyers on August 21, 1981, they retained

legal title to the property as security for the purchase price. *See Butler v. Wilkinson*, 740 P.2d 1244, 1254 (Utah 1987). However, upon entering into the contract of sale, the doctrine of equitable conversion came into play so that the McDermotts' interests became "an interest in *personalty* and not . . . one in realty . . ." *Id.* at 1255 (emphasis added); *see also Lach v. Deseret Bank*, 746 P.2d 802, 805 (Utah Ct. App. 1987).[3] Under Utah's judgment lien statute, a docketed judgment "becomes a lien upon all the *real* property of the judgment debtor . . . in the county in which the judgment is entered, owned by him at the time or by him thereafter acquired during the existence of said lien . . ." Utah Code Ann. § 78-22-1 (1987) (emphasis added). Under this statute, by reason of the judgment entered against the McDermotts, Zions Bank obtained a lien upon all of the McDermotts' real property on July 6, 1987, the date Zions' judgment was docketed. As of that date, however, the McDermotts had no *real property* interest in the subject property to which the judgment lien could attach.

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[3] In *Lach v. Deseret Bank*, 746 P.2d at 805, the court stated: The doctrine of equitable conversion provides that "an enforceable executory contract of sale [upon which an action for specific performance could be brought] has the effect of converting the interest of the vendor of real property to personalty." *Wilson v. State Tax Commission*, 28 Utah 2d 197, 499 P.2d 1298, 1300 (1972) (quoting *Allred v. Allred*, 15 Utah 2d 396, 393 P.2d 791, 792 (1964)). The purchaser acquires the equitable interest in the property at the moment the contract is created and is thereafter treated as the owner of the land. *Jelco, Inc. v. Third Judicial District Court*, 29 Utah 2d 472, 511 P.2d 739, 741 (1973).

The federal tax lien statute, on the other hand, provides that the amount of a delinquent taxpayer's liability "shall be a lien in favor of the United States upon *all property and rights to property, whether real or personal*, belonging to such person." 26 U.S.C. § 6321 (1954) (emphasis added). Accordingly, as of September 9, 1987, the date of filing its notice of lien, the IRS obtained a lien on the personal property of the McDermotts, which included their sellers' interest in the subject property. However, the IRS obtained no lien on the buyers' interest because the McDermotts had not yet reacquired the property and had no real property interest therein.

II. RELATIVE PRIORITIES OF LIEN CLAIMANTS IN SIMULTANEOUSLY OBTAINED LIENS ON REAL PROPERTY

Zions Bank and the IRS stipulated in the Escrow Agreement that the relative priorities of the lien claimants to the proceeds of sale were to be the same as the priorities of the respective liens after Bruce McDermott reacquired the property on September 23, 1987.[4] On that date, as the successful bidder at the Trustee sale, the McDermotts became the holder of the equitable and legal title to the property. At that point in time the liens of the competing claimants simultaneously attached as against the merged interests in real property. Because of the agreement of the parties, which appears to have varied the priorities to the sale proceeds, it becomes necessary to determine the relative priorities of simultaneously at-

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[4] *See supra* note 2.

taching liens to the McDermotts' after-acquired property.[5]

This court considers that the federal rule of "first in time, first in right" should be applied to the competing liens on the real property at issue here. *See Wisconsin v. Bar Coat Blacktop, Inc.*, 640 F.Supp. 407, 414 (W.D. Wis. 1986); *McAllen State Bank v. Saenz*, 561 F.Supp. 636, 639 (S.D. Tex. 1982); *United States v. Fleming*, 474 F.Supp. 904, 908 (S.D.N.Y. 1979). Application of that rule "encourages the diligent filing of liens whether or not after-acquired property is involved." *McAllen State Bank*, 561 F.Supp. at 640. Zions Bank's judgment lien was perfected as to all real property then owned and *thereafter* acquired by the McDermotts as of July 6, 1987, the date of docketing.[6] The federal tax lien was so perfected as of September 9, 1987, the date the IRS filed the lien with the Salt Lake County Recorder's Office.[7] Accordingly, the court concludes that

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[5] As with Zions' judgment lien, the tax lien of the IRS extends to after-acquired property. *See Glass City Bank v. United States*, 326 U.S. 265, 267 (1945).

[6] Utah Code Ann. § 78-22-1 (1987).

[7] During oral argument counsel for the United States asserted that a federal tax lien gains priority status based upon the assessment date of the taxes rather than the date the tax lien was filed. The court does not agree. 26 U.S.C. § 6323(a) (1954) provides: "The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or *judgment lien creditor* until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary or his delegate." (Emphasis added.) The definition of "judgment lien creditor" as used in § 6323(a) is set forth in 26 CFR § 301.6323(h)-1(g) (1988) as

> a person who has obtained a valid judgment, in a court of record and of competent jurisdiction, for the recovery of specifically designated property or for a certain sum of money. In the case of a judgment for the recovery of a certain sum of money, a judgment lien creditor is a person who has perfected a lien under the judgment on the property involved. A judgment lien is not perfected until the identity of the lienor, the property subject to the lien, and the amount of the lien are established. Accordingly, a judgment lien does not include an attachment or garnishment lien until the lien has ripened into judgment, even though under local law the lien of the judgment relates back to an earlier date. If recording or docketing is necessary under local law before a judgment becomes effective against third parties acquiring liens on real property, a judgment lien under such local law is not perfected with respect to real property until the time of such recordation or docketing . . .

The lien of Zions Bank pursuant to the docketed judgment clearly fits within the definitional requirements of the regulation. The holder of a security interest in a debtor's property, including a judgment lien, is protected against a federal tax lien if before the IRS files notice of its lien, the security interest is in existence, even if it came into existence after the date of assessment. *See Morrison Flying Serv. v. Deming Nat'l Bank*, 404 F.2d 856, 863 (10th Cir. 1969).

[8] Steven F. Alder claims $11,815.48 of the proceeds on deposit for attorneys fees allegedly incurred in the representation of the McDermotts for the collection and liquidation of the Trust Deed Note. Mr. Alder filed a motion for summary judgment alleging his entitlement to such funds, but later withdrew the motion conceding that disputed material facts must be resolved.

the lien of Zions Bank has priority and must be paid and satisfied in full prior to payment to the IRS for its subsequently filed lien.

Based upon the foregoing analysis, Zions Bank's Motion for Partial Summary Judgment is granted, and the IRS's Motion for Partial Summary Judgment is denied.[8] Counsel for Zions Bank is directed to pre-

pare and submit to the court a form of judgment and directive to the Escrow Agent consistent with this Memorandum Decision and Order after compliance with local Rule 13(e).

DATED: January 17, 1989.

/s/ J. Thomas Greene
J. THOMAS GREENE
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 90-4023

BRUCE J. MCDERMOTT and BETTY B. MCDERMOTT,
PLAINTIFFS

v.

ZIONS FIRST NATIONAL BANK,
DEFENDANT-APPELLEE

and

STEVEN F. ADLER, DEFENDANT-CROSS-CLAIMANT

v.

THE UNITED STATES OF AMERICA by and through
the INTERNAL REVENUE SERVICE,
DEFENDANT-CROSS CLAIM DEFENDANT-APPELLANT

JUDGMENT

Entered October 2, 1991

Before TACHA, SETH, Circuit Judges, and BRATTON, District Judge.*

---

* Honorable Howard C. Bratton, Senior District Judge of the United States District Court for the District of New Mexico, sitting by designation.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Utah, and was argued by counsel. .

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

Entered for the Court

ROBERT L. HOECKER
Clerk

/s/ Patrick Fisher
By: PATRICK FISHER
Chief Deputy Clerk

☆ U. S. GOVERNMENT PRINTING OFFICE, 1982 512324 45256

Supreme Court, U.S.
FILED
APR 15 1992
OFFICE OF THE CLERK

(2)

No. 91-1229

In The

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA, by and through INTERNAL REVENUE SERVICE,

Petitioner,

v.

BRUCE J. McDERMOTT and BETTY McDERMOTT, ZIONS FIRST NATIONAL BANK, N.A.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF ZIONS FIRST NATIONAL BANK, N.A. IN OPPOSITION

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QUESTION PRESENTED

Whether a judgment lien of a private creditor that predates a federal tax lien has priority over the tax lien with respect to real property acquired by the debtor/taxpayer after the tax lien was filed.

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No. 91-1229

In The

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BRIEF OF ZIONS FIRST NATIONAL BANK, N.A. IN OPPOSITION

Respondent Zions First National Bank, N.A., through counsel, respectfully submits the following Brief in Opposition to the Petition for a Writ of Certiorari filed by the United States of America in this case.

OPINIONS BELOW

The Statement of Opinions Below and Jurisdiction supplied by the United States in this Petition accurately present the opinions of the lower courts and will not be

supplemented in this Brief. References to said opinions will be to those as included in the Appendix of the Petition of the United States.

STATUTORY PROVISIONS INVOLVED

1. 26 U.S.C. § 6321 provides:

   LIEN FOR TAXES.

   > If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

2. 26 U.S.C. § 6323(a) provides:

   PURCHASERS, HOLDERS OF SECURITY INTERESTS, MECHANIC'S LIENORS, AND JUDGMENT LIEN CREDITORS.

   > The lien imposed by section 6321 [Lien for Federal Taxes] shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary.

3. Utah Code Annotated § 78-22-1 (1987 Repl.) provides:

   > From the time the judgment of the district court or circuit court is docketed and

> filed in the office of the clerk of the district court of the county it becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in the county in which the judgment is entered, owned by him at the time or by him thereafter acquired during the existence of said lien. . . .

STATEMENT OF THE CASE

Prior to August 21, 1981, Bruce J. McDermott and Betty B. McDermott ("McDermott") were the owners of fee simple title to a certain parcel of real property located in Salt Lake City, Utah (hereinafter the "Property"). On or about August 21, 1981, McDermott as "Seller", entered into a Uniform Real Estate Contract with third parties, as "Buyer" for the sale and purchase of the Property. To secure in part the Buyer's obligation under the Uniform Real Estate Contract, McDermott accepted from the Buyer a Trust Deed Note and a Trust Deed on the Property securing said Note with Buyer's interest in the Property, notwithstanding the fact that legal title to the Property remained vested in McDermott. (R. 4, ¶¶ 1-3).

On June 22, 1987, a Judgment was entered in the Third Judicial District Court of Salt Lake County, State of Utah, against McDermott and in favor of Zions First National Bank ("Zions") in the amount of $67,977.67 together with post-judgment interest and attorneys fees, which Judgment was duly docketed on July 6, 1987 in Book 213 as Entry No. 2402. (R. 6, ¶ 2 and Exhibit "A" attached thereto).

On September 9, 1987, a Notice of Federal Tax Lien Under Internal Revenue Service was filed with the Salt Lake County Recorder's Office alleging an unpaid tax liability of McDermott in the amount of $103,657.93. (R. 4, ¶ 5).

As a result of an eventual breach of Buyer's default in the payment obligations of the Uniform Real Estate Contract and the Trust Deed Note, McDermott commenced a power of sale foreclosure on the Property, the actual Trustee's Sale for which occurred on September 23, 1987. The high bidder at the Trustee's Sale was McDermott, who repurchased the Property. (R. 4, ¶¶ 6-7).

During the last three months of 1987, negotiations were pursued between Zions and the United States of America through the Internal Revenue Service ("IRS") concerning the respective priorities of their competing lien claims against the Property and potential proceeds therefrom. An Escrow Agreement was prepared by counsel for McDermott to memorialize the ultimate agreement between Zions and the IRS providing a consensual ordering of the priorities of the respective lien claims as applicable to the proceeds. (R. 12, ¶¶ 3, 7-11). The final Escrow Agreement, dated March 4, 1988, and executed by McDermott, Zions and the IRS, contains the following negotiated language:

> The respective priorities of the parties to the cash proceeds shall be identical to the priorities of the respective liens of the parties as they existed against the real property as of September 23, 1987, after Bruce J. McDermott successfully bid and purchased the property at the

> Trustee's Sale, notwithstanding the change in form of collateral.

McDermott sold the Property to an independent party on or about March 4, 1988, the net proceeds of which totaling $135,575.50 were paid into the Third District Court of Salt Lake County, State of Utah, concurrently with the filing of a Complaint for Interpleader by McDermott commencing this action. (R. 4, ¶¶ 8-9).

The suit was removed from the state court to the United States District Court for the District of Utah on motion of the IRS. (R. 1). Zions and the IRS thereafter filed Motions for Summary Judgment, each asserting that it was entitled to satisfy its lien from the proceeds first. (R. 3 and 7). In its Memorandum Decision and Order, dated January 17, 1989, granting summary judgment in favor of Zions, the Honorable J. Thomas Greene held that the Escrow Agreement had reordered the priorities of the competing liens as against the proceeds to be identical to the respective priorities of the liens as they existed against the real property immediately following the Trustee's Sale. The District Court further held that between the two simultaneously attaching liens, Zion's judgment lien enjoyed a priority over the IRS tax lien because of its earlier date of docketing. (R. 21).

Pursuant to an appeal by the IRS, the Tenth Circuit Court of Appeals reviewed and upheld the decision of the district court. The Court found that the Escrow Agreement had consensually resolved any issues as to the nature of the property subject of the liens. It further held that Zions' judgment lien had obtained cohate status prior to the filing of the tax lien and thus was entitled to

priority as to the proceeds from the sale of the Property. The fact that the specific Property was obtained subsequent to the perfection of both the judgment lien and the tax lien did not affect the cohate character of those liens which, being general in nature, applied to *all* of McDermott's real property located in Salt Lake County.

REASONS FOR DENYING THE PETITION

The Tenth Circuit affirmed the district court decision, holding that a judgment creditor's claim has priority under federal law over a subsequently filed federal tax lien on real property acquired by the debtor/taxpayer subsequent to the attachment of both the judgment lien and the tax lien. Contrary to the assertions of the IRS, this holding is consistent with the only other federal appeals court decision on the issue, *Southern Rock, Inc. v. B & B Auto Supply*, 711 F.2d 683 (5th Cir. 1983) as well as every reported decision by the federal district courts since 1978. *McAllen State Bank v. Saenz*, 561 F. Supp. 636 (S.D. Tex. 1982); *State of Wisconsin v. Bar Coat Blacktop, Inc.*, 640 F. Supp. 407 (W.D. Wis. 1986); *United States v. Fleming*, 474 F. Supp. 904 (S.D.N.Y. 1979).

Although potentially significant to the IRS for its administrative impact, this case has now twice been decided in accordance with well accepted federal and state law. Together with the decision of *Southern Rock, supra*, the Tenth Circuit opinion stands as a well-defined standard for the determination of priorities of conflicting liens with respect to after-acquired real property of a debtor/taxpayer.

The competing lien claims of Zions and the IRS are based upon separate and distinct authorities. The judgment lien claimed by Zions attaches to all real property owned by the judgment debtor upon its docketing. Pursuant to Utah Code Ann. § 78-22-1 (1953, as amended), the Utah State Supreme Court has unfailingly held that the docketing of the judgment is the act which creates the lien. *Orton v. Adams*, 21 Utah 2d 245, 444 P.2d 62, 63 (1968). Further, that court has declared that "a judgment automatically becomes a lien upon all nonexempt real property of the debtor at the time it is docketed." *Taylor National, Inc. v. Jensen Brothers Construction Company*, 641 P.2d 150, 155 (Utah, 1982). The definition of "judgment lien creditor" as used in 26 U.S.C. § 6323(a) is set forth in 26 CFR § 301.6323(h)-1(g) and undisputedly includes the judgment lien of Zions as docketed.

The federal tax lien claimed by the IRS may attach to all real *and* personal property of the delinquent taxpayer pursuant to 26 U.S.C. § 6321. Although effective as of the date of the tax assessment, the priority of the tax lien is based upon the date that the Notice thereof is filed with the appropriate county recorder. In this matter, the only property being claimed by the IRS under its tax lien is all of the real property located in Salt Lake County and owned by the delinquent taxpayer -- the identical property claimed by Zions.

As a general rule, the first lien of record against a debtor's property has priority over those subsequently filed unless a lien-creating statute clearly shows or declares an intention to cause the statutory lien to override. This principle has been paraphrased as the universal rule of "first in time is the first in right." *United States v.*

City of New Britain, 347 U.S. 81, 85 (1954); *Merger v. United States*, 375 U.S. 233 (1963).

Federal law determines the priority between federal tax liens and state created liens. *United States v. Equitable Life Assurance Society of the United States*, 384 U.S. 323, 328 (1966). Under Section 6323(a) of the Internal Revenue Code, judgment lien creditors are granted priority over federal tax liens when the judgment lien is perfected and "cohate" prior to the filing of the Notice of Tax Lien. *United States v. City of New Britain*, 347 U.S. 81, 85-86 (1954). Whether or not a judgment lien is cohate is also a federal question. *United States v. Security & Savings Bank, Executor*, 340 U.S. 47, 49-50 (1950). This Court has required "the identity of the lienor, the property subject to the lien, and the amount of the lien" to be established in order for the lien to be classified as "cohate." *City of New Britain*, 347 U.S. at 84. This same requirement has been adopted into the IRS regulations for purposes of the applying 26 U.S.C. § 6323(a).

The parties to this action stipulated that their respective claims to the proceeds would be determined by their respective priority claims as against the Property upon purchase of same by McDermott at the Trustee's Sale. Zions' judgment lien had, on July 6, 1987, become cohate in that the amount of the lien, the identity of the debtor, and the fact that the lien was fixed upon all real property located in Salt Lake County, had been determined. Similarly, the IRS tax lien became perfected on September 9, 1987 as to all real property owned by McDermott. The nature of McDermott's interest in the Property was only personalty until their purchase at the Trustee's Sale on

September 23, 1987 at which time they acquired the Property reuniting the legal and equitable interests. At that moment, pursuant to the express terms of the Escrow Agreement, both the IRS tax lien and Zions judgment lien immediately and simultaneously attached specifically to the Property.

The issue of priority of liens simultaneously attaching to after-acquired property of a debtor has resulted in an evolution of the law through continued analysis over the past 41 years. Resort to the Tax Code is not fruitful. "Section 6323 certainly was not enacted to decide dead heats among racing lien holders." *Texas Oil & Gas Corporation v. United States*, 466 F.2d 1040, 1052 (5th Cir. 1972), *cert. denied*, 410 U.S. 929 (1973).

First discussed theoretically in *United States v. Graham*, 96 F. Supp. 318 (S.D. Cal. 1951), *aff'd sub nom, California v. United States*, 195 F.2d 530 (9th Cir. 1952), *cert. denied*, 344 U.S. 831 (1952), the analysis was prefaced by that court's remarks: "The determination of this question is not necessary to the decision in this case." However "assuming arguendo" that the claimant competing with the federal tax lien had a valid lien, the court surmised without citation to any authority, that a federal tax lien would be superior to any simultaneously attaching interest of another party. 96 F. Supp. at 321. *Graham* was thereafter cited with approval, again in dictum and without statutory or other authority, in the other cases cited by the IRS in support of its Petition. *United States v. Meyer*, 346 F. Supp. 554 (S.D.N.Y. 1972); and *MDC Leasing Corp. v. New York Property Insurance Underwriting Association*, 450 F. Supp. 179, 181 (S.D.N.Y. 1978). In both of these

New York cases, the court actually found that the claimant competing with the federal tax lien had failed to perfect its lien and was therefore subordinate and junior to the IRS. Resolution of the ultimate issue of simultaneous attachment was not necessary.

The first known reported case to wrestle with the issue directly was *Iowa Fair Plan v. United States*, 257 N.W.2d 626 (Iowa 1977). There, in a five to four split decision, the court held that because a first-filed state lien attached simultaneously with a federal tax lien on after-acquired property of the borrower, it failed to become cohate "before the tax lien." *Id.* at 629. Accordingly, it presented the federal tax lien with super-priority without any cite to statutory authority for the elevating decree.

The next discovered case on point began the movement to analyze the respective rights of the competing lien claimants in light of statutory and case law precedent. In *United States v. Fleming*, 474 F. Supp. 904 (S.D.N.Y. 1979), various state, city and federal tax liens were filed against the taxpayer, all prior to their purchase of certain personal property. By statute, each of the tax liens covered after-acquired property. The IRS argued that based on the dicta of *Graham*, the IRS should receive priority status notwithstanding the simultaneous attaching of the tax liens upon the purchase by Fleming of the property. The same court which had previously cited *Graham* favorably, now disapproved of its sweeping reasoning, limited it to its facts, and declared that the state liens enjoyed an equal footing with the IRS liens.

The Federal District Court in Texas made the earliest comprehensive analysis of the issue in *McAllen State Bank*

v. Saenz, 561 F. Supp. 636 (S.D. Tex. 1982). In a case remarkably similar to the present matter, that court was required to determine the relative priorities of a federal tax lien and a judgment lien to the proceeds of a foreclosure sale of after-acquired real property. As is the law in Utah, a judgment lien in Texas is perfected as to all real property situated in the county in which the judgment is indexed or docketed. After recognizing that both judgment and tax liens attach to after-acquired property, and deciding that the competing liens were both cohate and properly perfected, the court acknowledged that "the priority of competing liens on which there is a federal tax lien is determined by federal law. *Aquilino v. United States*, 363 U.S. 509, 80 S. Ct. 1277 (1960)." 561 F. Supp. at 639. *Graham* was discarded on its facts with no deference to its dicta. *Fleming* was cited as being in accord with Texas law. But inasmuch as the determination of tax lien priorities is governed by federal law, the federal rule of "first in time, first in right" required the court to order the first payment of proceeds to the first lien of record even though both lien claimants preceded the purchase of the property by the debtor. This holding "encourages the diligent filing of liens [even by the IRS] whether or not after-acquired property is involved." *Id.* at 640.

Taking the opportunity to review the relevancy and reliability of many of the above-cited cases, the court encountered the same issue in *State of Wisconsin v. Bar Coat Blacktop, Inc.*, 640 F. Supp. 407 (W.D. Wis. 1986). Narrowly limiting *Graham* and its progeny to their specific facts, the court rejected the notion that on the issue of simultaneously attaching liens, "tie goes to the federal government." 640 F. Supp. at 414. Finding "no legal or

policy reason that would mandate a deviation" from the *McAllen State Bank* rule, the Court ordered that the funds on deposit be paid as against the pre-acquisition liens in the order of their perfection.

Southern Rock, Inc. v. B & B Auto Supply, 711 F.2d 683 (5th Cir. 1983) is the only other known federal appeals case wherein the Court directly addressed the issue of competing lien claims including federal tax liens which attached simultaneously to after-acquired property of a debtor. The Fifth Circuit Court refused the rule of *MDC Leasing, supra*, that any competing lien simultaneously attaching with the tax lien lacked cohateness prior to attachment and was therefore inferior.

> In our view, another aspect of cohateness that no longer floats, although concededly not specifically addressed by § 6323, is the notion that a tie goes to the government. To the extent that the purpose of the Federal Tax Lien Act was to conform tax liens to Article 9 security interests, the way to achieve this goal is to treat the government like any other creditor. Giving the government's filed tax lien priority over a simultaneously recorded security interest would defeat this goal. We do not believe that is what Congress intended.

711 F.2d at 689. The Court there recognized the evolution in the courts which has removed the unauthorized super-priority demanded by the IRS in favor of a treatment of lien claims on equal footing.

In its Petition, the IRS asserts that *Southern Rock* represents a third option in dealing which simultaneous attaching cases - that the competing claimants should

share *pro rata* in the proceeds of the Property. A careful reading of the case shows that the reason for the *pro rata* distribution was its inability to determine which of the competing claims had in fact attached first. "[W]e are left with a simultaneous filing and must decide who wins when the race to the courthouse ends in a tie." 711 F.2d at 688. Such is not the case in the instant matter.

The present case, most factually similar to *McAllen State Bank*, was properly resolved below in conformance with that opinion as confirmed by *Bar Coat Blacktop*. Zions' judgment lien was cohate and perfected as to all real property then and thereafter owned by McDermott at the date of docketing. Nothing further was required of Zions to attach the lien on after-acquired property. Utah Code Annotated § 78-22-1 (1987 Repl.). Likewise, the federal tax lien was cohate and perfected as to all real property then or thereafter owned by McDermott as of September 9, 1987. *Glass City Bank of Jeanette, Pa. v. United States*, 326 U.S. 265, 66 S. Ct. 108 (1945). Attaching to the Property simultaneously, the federal rule of "first in time, first in right" must apply. Zions' lien was properly accorded priority over the IRS's subsequently filed lien. *United States v. City of New Britain*, 347 U.S. 81 (1954).

Other than a single 15 year-old state court decision and a short line of federal district court cases apparently abandoned in favor of a better reasoned approach based on the doctrine of cohateness, there exists no reason for this Court to reopen an issue which has been the subject of agreement by the Fifth and Tenth Circuits.

CONCLUSION

Based on the foregoing analysis, the Court should deny IRS' Petition for a Writ of Certiorari.

Respectfully submitted this 16th day of April, 1992.

CALLISTER, DUNCAN & NEBEKER
By T. RICHARD DAVIS
Attorneys for Zions First National Bank, N.A.

Supreme Court, U.S.
FILED
APR 27 1992
OFFICE OF THE CLERK

No. 91-1229

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, BY AND THROUGH INTERNAL REVENUE SERVICE, PETITIONER

v.

BRUCE J. MCDERMOTT AND BETTY MCDERMOTT AND ZIONS FIRST NATIONAL BANK, N.A.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

KENNETH W. STARR
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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1229

UNITED STATES OF AMERICA, BY AND THROUGH INTERNAL REVENUE SERVICE, PETITIONER

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REPLY BRIEF FOR THE UNITED STATES

Respondent concedes (Br. in Opp. 6) that the question presented in this case is a recurring one of substantial administrative importance. Respondent also concedes (*id.* at 10) that the decision in this case conflicts directly with the decision of the Supreme Court of Iowa in *Iowa Fair Plan* v. *United States*, 257 N.W.2d 626 (1977). Certiorari review is warranted for these reasons alone. See Sup. Ct. R. 10.1(a).

While respondent concedes (Br. in Opp. 9, 12) that the decision in this case also conflicts with the decision in *MDC Leasing Corp.* v. *New York Property Insurance Underwriting Association*, 450 F. Supp. 179 (S.D.N.Y.

1978), respondent fails to acknowledge that *MDC Leasing* was affirmed by the Second Circuit. 603 F.2d 213 (1979). Similarly, the district court decision in *United States* v. *Graham*, 96 F. Supp. 318 (S.D. Cal. 1951), the reasoning of which also conflicts with the decision in this case (see Br. in Opp. 9), was affirmed by the Ninth Circuit, under the name of *California* v. *United States*, 195 F.2d 530, cert. denied, 344 U.S. 831 (1952).

The decision of the court of appeals thus conflicts with decisions in two other circuits and with the decision of a State Supreme Court. For these reasons, and for the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

APRIL 1992

Supreme Court, U.S.
FILED
JUL 1 1992
OFFICE OF THE CLERK

No. 91-1229

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, by and through
INTERNAL REVENUE SERVICE, PETITIONER

v.

BRUCE J. MCDERMOTT and BETTY MCDERMOTT,
and ZIONS FIRST NATIONAL BANK, N.A.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: JANUARY 29, 1992
CERTIORARI GRANTED: MAY 26, 1992

BEST AVAILABLE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1229

UNITED STATES OF AMERICA, by and through
INTERNAL REVENUE SERVICE, PETITIONER

v.

BRUCE J. McDERMOTT and BETTY McDERMOTT,
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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOINT APPENDIX

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U.S. DISTRICT COURT
DISTRICT OF UTAH
(Central)

Case No. 88-CV-399

BRUCE J. MCDERMOTT, PLAINTIFF

BETTY B. MCDERMOTT, PLAINTIFF

v.

ZIONS FIRST NATIONAL BANK, DEFENDANT

USA/IRS, DEFENDANT

STEVEN F. ALDER, DEFENDANT

STEVEN F. ALDER, CROSS-CLAIMANT

v.

USA/IRS, CROSS-DEFENDANT

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
4/5/88	1	PETITION FOR REMOVAL from Salt Lake County. Dist Ct of Ut Assigned to HON. J. THOMAS GREENE, JUDGE
6/7/88	2	GOV ANSWER and response to cross-claim
9/7/88	3	Def Zion's Mot for Partial Summ Jdgmt
	4	Def Zion's MEMO in Suppt of Mot for Partial Summ Jdgmt

DATE	NR.	PROCEEDINGS
	5	AFF of T. Richard Davis in Suppt of Mot for Partial Summ Jdgmt
	6	AFF of Philip Meeks in Suppt of Mot for Partial Summ Jdgmt
9/23/88	7	Pltf's Mot for Summ Jdgmt
	8	Pltfs' Memo in Suppt of Mot for Summ Jdgmt
10/6/88	9	Def Zion Bank's Notice of Hrg, re: Mot for Partial Summ Jdgmt, 11-14-88 at 3:00 PM
10/27/88	10	Pltfs' Mot for Summ Jdgmt of Steve Alder (Cross-Claimant)
	11	Pltf's Memo in Suppt of Mot for Summ Jdgmt
	12	AFF of Cheryl M. Bower
	13	Alder's Notice of Hrg, re: Mot for Summ Jdgmt, set for 11-14-88 at 3:00 PM.
11/8/88	14	Def Zion's Memo in Oppos to Gov's Mot for Summ Jdgmt
11/10/88	15	AMND Notice of Hrg, re: Mot for Summ Jdgmt, re-set for 11-22-88 at 11:00 AM. cc; attys
11/16/88	16	Pltfs' Notice of Depos, American Home Assurance Co., 11-20-88.
11/28/88	17	Gov's Memo in Oppos to Alder's Mot for Summ Jdgmt
12/1/88	18	Came before the crt on mots/SJ. Mr. Alder withdrew his mot/SJ & was excused. As to the other 2 mots/SJ, Crt hrd args of Mr. Davis & Mr. Lusty. Discussion held. Cnsl to simultaneously file suppl memo by 12/22, at which time both mots will be deemed under advisement & Crt will rule without hrg further args.
12/22/88	19	Gov's Suppl Memo in Suppt for Summ Jdgmt and in Oppos to Zion's Mot for Summ Jdgmt

DATE	NR.	PROCEEDINGS
12/22/88	20	Def Zion's Suppl Memo in Suppt of Def's Mot for Partial Summ Judgment
1/18/89	21	MEMO DECISION/ORDER JTG 1/17/89 re: Zions Bank's mot/partial sj is GRANTED and IRS Mot/partial SJ is DENIED; Zions Bank to submit judgment cc:attys
2/8/89	22	DEF supplemental aff of T. Richard Davis re: atty fees
2/9/89	23	JUDGMENT and DIRECTIVE of payment JTG 2/8/89 re: Clerk of the Court is ordered to make immediate payment of $86,933.13 to Zions Bank and retain the remainder of the fund held in this matter for future determination of this court cc:attys
3/3/89	24	File received from Third Judicial District Court
3/14/89	25	RECEIPT showing T. Richard Davis, Esq received check for $86,933.13
4/26/89	26	GOV Memo in support of mot/dismiss cross-claim
	27	GOV mot/dismiss cross-claim
5/10/89	28	PLTF response to mot/dismiss and notice of reduction of Alder's claim
5/17/89	29	GOV notice of hrg set for 7/17/89 at 11:00 Am re; mot/dimiss cross-claim
6/7/89	30	GOV mot/sj
	31	GOV memo in support of mot/sj
	32	GOV memo in support of obj and mot/strike
	33	GOV notice of hrg set for 8/21/89 at 11:00 Am re: mot/sj and mot/strike and mot to dismiss cross-claim

DATE	NR.	PROCEEDINGS
6/23/89	34	PLTF memo in oppo to Zion's mot/sj
7/18/89	35	GOV Notice to take depo of Alder 9/1/88 9:30 Am; McDermott 11:30AM; Hansen 2:00 PM
8/21/89	36	MIN. ENTY/MSJ-Mot/Dism. MOTS DENIED. Ct fixed the following sched.: Disc/c/o 11/13/89. PT Conf set on 11/13/89 at 10:45 AM Ct granted Mr. Alder lv to amend reduction of attys fees to $9000 by interlineation.
9/19/89	37	ORDER JTG 9/18/89 re: cross-claim of Alder is reduced by interlineation from $11,815.48 to $9,000; US mot/sj is DENIED; set for pre-trial conf 11/13/89 at 10:45 Am cc: attys
11/13/89	38	Minute entry: Final Pretrial Conference held—pltf is going to dismiss the action and a stip and order of dismissal will be filed before 11/17/89; case was dismissed; it was agreed that the funds being held by the Clerk of Court will be released to the govt [Entry date 1/30/89]
12/6/89	39	Order signed by JTG 123/5/89 re: cross-claim of Alder against the US is dismissed w/prej; complt of pltf insofar as that complt seeks relief against the US is dismissed w/prej and Clerk of Court directed to pay to US all funds now held by the Clerk of the Court cc:attys [Entry date 12/7/89]
12/7/89	—	Case closed
1/29/90	40	Notice of appeal by USA/IRS, appealing the order entered 1/10/89 and the final judg entered 12/6/89; Fee Status: not required [Entry date 2/1/90]
2/1/90	41	Notice of appeal and certified copy of docket to USCA and cnsl: [40-1] appeal

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 90-4023

BRUCE J. MCDERMOTT, PLAINTIFF

BETTY B. MCDERMOTT, PLAINTIFF

v.

ZIONS FIRST NATIONAL BANK, DEFENDANT-APPELLEE

v.

INTERNAL REVENUE SERVICE OF
THE UNITED STATES, DEFENDANT CROSS CLAIM
DEFENDANT-APPELLANT

STEVEN F. ADLER, DEFENDANT

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
2/7/90	1	[406200] Civil case docketed. Preliminary record filed. Transcript order form due 2/8/90 for Reeve Butler pursuant to R.42.1. Docketing statement due 2/20/90 for IRS. Appellant's brief due 3/12/90 for IRS, Appellant's designation of record due 3/12/90 for IRS. Notice of appearance due 2/20/90 for Kirk C. Lusty, for T. Richard Davis (mt)
2/12/90	2	[407434] Notice received from that a transcript is not necessary for this appeal. (lwb)
2/12/90	3	[407435] Docketing statement filed by IRS. Original and 0 copies c/s: y. (lwb)

DATE	NR.	PROCEEDINGS
2/12/90	4	[407436] Order filed by Judge(s) RLH—docketing statement attachments due 2/22/90 for IRS pursuant to Rule 42. (lwb)
2/20/90	6	[409172] Notice of appearance filed by T. Richard Davis as attorney for Zions First National. CERT. OF INTERESTED PARTIES (y/n): y (lwb)
2/22/90	7	[409634] Docketing statement attachments filed by IRS. 4 copies. (lwb)
2/28/90	8	[411024] Notice of appearance filed by Gary R. Allen, Shirley D. Peterson, James H. Love as attorney for IRS. CERT. OF INTERESTED PARTIES (y/n): n (lwb)
2/28/90	9	[411028] Order filed by RLH notice of appearance form due 3/12/90 for Kirk C. Lusty (lwb)
3/23/90	10	Attorney terminated: attorney Kirk C. Lusty for IRS (lwb)
3/23/90	11	[416606] Order filed by RLH—Appellant's brief due 4/2/90 for IRS Appellant's designation of record due 4/2/90 for IRS (lwb)
3/30/90	13	[418476] Appellant's motion filed by Appellant IRS to extend time to file appellant's brief until 4/27/90 [90-4023]. Original and 3 copies c/s: y (lwb)
3/30/90	14	[418477] Order filed by (lwb) RLH granting Appellant/Petitioner motion to extend time to file apet brief [418476-1] (lwb)
5/1/90	15	[426409] Appellant's brief received but not filed by IRS. 5/7/90 for IRS Appellant's designation of record due 5/17/90 for IRS (lwb)
5/1/90	16	[426750] Notice of appearance filed by William S. Estabrook as attorney for IRS. CERT. OF INTERESTED PARTIES (y/n): n (lwb)

DATE	NR.	PROCEEDINGS
5/1/90	17	[426754] Designation of record filed by Appellant IRS. Original and 1 copies. [90-4023] (lwb)
5/17/90	18	[429630] Notice of appearance filed by Regina S. Moriarty as attorney for IRS. CERT. OF INTERESTED PARTIES (y/n): n (klb)
5/17/90	19	[429636] Appellant's brief filed by IRS. Original and 7 copies. c/s: yes. Served on 5/16/90 Oral argument? yes. Appellee's brief due 6/18/90 for Zions First National (klb)
6/18/90	90	[436572] Appellee's motion to extend time to file appellee's brief until 7/18/90 filed by Zions First National. Original and 3 copies. c/s: y (lwb)
6/19/90	21	[436573] Order filed by (lwb) RLH granting Appellee/Respondent motion to extend time to file eres brief [436572-1] 7/18/90 for Zions First National (lwb)
7/18/90	22	[443702] Designation of record filed by Appellee Zions First National. Original and 1 copies. [90-4023] (lwb)
7/18/90	23	[443704] Appellee's brief filed by Zions First National. Original and 7 copies. c/s: y. Served on 7/17/90 Oral Argument? yes Appellant's optional reply brief due 8/3/90 for IRS (lwb)
7/26/90	24	[444657] Order filed by Judge(s) Holloway—Record on Appeal due 8/6/90 for J. Thomas Greene pursuant to Rule 11.1. (lwb)
8/7/90	26	[447465] Record on appeal filed: 1 Volume(s) —Copy filed in Volume(s) (y/n): yes. Vol. 1—pleadings (lwb)

DATE	NR.	PROCEEDINGS
2/22/90	29	[490241]Hearing set for May 1991 Session, at Denver. (sls)
3/25/91	30	[497722] Appellant's settlement conference report filed. Original and 0 copies (lwb)
3/27/91	31	[498230] Appellant's settlement conference submitted to panel. (sls)
4/15/91	32	[505106] Notice that appeal did not settle filed by Appellee Zions First National. Original and 0 copies. c/s: y (lwb)
5/6/91	34	[507505] Case argued and submitted to Judges Tacha, Seth, Bratton. (sls)
7/29/91	36	[528733] Order filed by Judge(s) Tacha, Seth, Bratton to supplement the record on appeal Supplemental roa due 8/8/91 for J. Thomas Greene Parties served by mail. (lwb)
8/13/91	39	[532834] Supplemental record filed: Sup. Vo. 1 Copy filed in Volume(s) : yes. pleadings (lwb)
10/2/91	40	[543502] Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Tacha, panel member; Seth, panel member; Bratton, authoring judge. [90-4023] (kas)
10/24/91	41	[548016] Mandate issued to district court. (mt)
11/1/91	42	[563804] Mandate receipt filed. (lwb)
2/4/92	43	[572482] Petition for writ of certiorari filed on 1/29/92 by Appellant IRS. Supreme Court Number 91-1229. (mt)
5/29/92	44	[596601] Supreme Court order dated 5/26/92 granting certiorari filed. (kc)

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

No. C88-02264

Judge Frank G. Noel

BRUCE J. MCDERMOTT and BETTY B. MCDERMOTT,
PLAINTIFFS

vs.

ZIONS FIRST NATIONAL BANK, N.A., and THE UNITED STATES OF AMERICA by and through the INTERNAL REVENUE SERVICE, and STEVEN ALDER, DEFENDANTS

STEVEN F. ALDER, CROSS-CLAIMANT

v.

THE UNITED STATES OF AMERICA and the INTERNAL REVENUE, CROSS-CLAIM DEFENDANT

COMPLAINT FOR INTERPLEADER AND DECLARATORY RELIEF AND CROSS-CLAIM

COMES NOW the Plaintiffs, and for cause of action alleges as follows:

1. This action is brought pursuant to Utah Code Annotated, § 70A-7-602 and Rule 22 of the Utah Rules of Civil Procedure.

2. Venue is properly with this Court.

3. Plaintiffs are individuals residing at 1008 South 1900 East, Salt Lake City, Salt Lake County, Utah and are hereinafter referred to as "McDERMOTT" or "Taxpayer".

4. Plaintiffs have "cash proceeds", the value of which is $500.00 or more, which proceeds are governed by the attached Escrow Agreement dated on or about March 4, 1988. See Exhibit "A".

5. Plaintiffs shall, in conjunction with the filing of this action, deposit said cash proceeds into the registry of the court, there to abide the judgment of this court.

6. Plaintiffs further seek, by an Ex-Parte Motion filed with this Complaint, an order to be prepared and signed by the presiding judge, allowing the funds deposited herewith to be placed in an interest-bearing account for the benefit of the parties, as the court may hereafter determine their rights.

7. Defendant, ZIONS FIRST NATIONAL BANK (hereinafter "ZIONS") is registered as a national banking association with its principal place of business in the State of Utah. ZIONS' registered agent is Duane B. Welling, 350 Kennecott Building, Salt Lake City, Utah. Its attorney of record in this matter is T. Richard Davis, 800 Kennecott Building, Salt Lake City, Utah.

8. ZIONS is claiming, or may claim, to be entitled to a portion of the cash proceeds deposited herewith by virtue of a judgment in the amount of $67,977.67 at 12 percent interest against McDERMOTT, docketed in Book 213 at Page 2402 on June 22, 1987.

9. Defendant UNITED STATES OF AMERICA, by and through the INTERNAL REVENUE SERVICE (hereinafter "IRS") is claiming, or may claim, to be entitled to a portion of the cash proceeds deposited herewith by virtue of a tax lien filed against McDERMOTT in the amount of $103,657.93 on September 9, 1987. Said lien was filed with the Salt Lake County Recorder's Office and is recorded as Entry No. 4519592 of the official records. The Internal Revenue Service officer filing said tax lien is Richard Hardman, Chief of Special Procedures.

10. Defendant, STEVEN F. ALDER (hereinafter "ALDER") is claiming, or may claim, to be entitled to a portion of the cash proceeds deposited herewith by virtue of the provisions of Utah law and equity for services performed on behalf of Plaintiff as described herein.

11. At the time that the lien was filed and the judgment docketed against McDERMOTT, McDERMOTT claimed an interest to certain real property located at 2091 East 1300 South, Salt Lake City, Salt Lake County, Utah, by virtue of a Trust Deed and Trust Deed Note executed in connection with a certain Uniform Real Estate Contract (hereinafter "UREC") dated August 21, 1981, wherein McDERMOTT appears as seller of the above-described property and Ron W. Christensen and Gary L. Carter appear as buyers. See Exhibits "B" through "D". The legal description of the property is as follows:

> Commencing at a point 176.41 feet West from the Original Southeast corner of Lot 1, Block 27, Five Acre Plat "C", Big Field Survey, and running thence North 140.99 feet; thence West 55.0 feet; thence South 140.99 feet; thence East 55.0 feet to the place of commencement.

Also:

> Commencing 100 feet West from the Southeast corner of Lot 1, Block 27, Five Acre Plat "C", Big Field Survey, and running thence South 89 degrees 57' West 76.41 feet; thence North 140.99 feet; thence North 89 degrees 57' East 76.41 feet; thence South 140.99 feet to the place of beginning.

Said Trust Deed was recorded in Book 5284 at page 957 as Entry No. 3597857 on August 14, 1981. Notice of the UREC attached as Exhibit "B" hereto was disclosed by a certain notice of contract dated August 21, 1981, and

recorded August 24, 1981, as Entry No. 3597856 in Book 5284 at Page 956 of the official records.

12. A breach of the obligations of the Trust Deed Note for which the property was conveyed as security occurred in the fall of 1985, and Steven F. Alder was substituted as Trustee. Notice of Default was recorded February 7, 1986, as Entry No. 4198987 in the official records and said trustee proceeded to foreclose on the property by Trustee's Sale scheduled for June 20, 1986.

13. Prior to the Trustee's Sale schedule for June 20, 1986, the buyers, Ron Christensen and Gary Carter, assigned their interest in the UREC described herein to C&C Investments. Said assignment was recorded as Entry No. 4263843 in Book 5780 at Page 610 of the official records on June 19, 1986. See Exhibit "E".

14. On June 20, 1986, said entity, C&C Investments, filed a petition under Chapter 11 of the Bankruptcy Code styled as Case No. 86A-02610. Pursuant to Section 362 of the Bankruptcy Code, the Trustee's Sale was stayed.

15. During the course of the bankruptcy proceedings, McDERMOTT actively pursued the debtor in an attempt to have the property released from the bankrupt estate. These efforts culminated in provisions 5.1 in the Confirmed Plan of Reorganization allowing McDERMOTT to exercise all legal and equitable rights against the property in the event debtor failed to obtain a written purchase offer by August 15, 1987. See Exhibits "F" and "G".

16. On or about August 15, 1987, the debtor informed McDERMOTT that no offer had been obtained. McDERMOTT informed the debtor's attorney that he intended to proceed and foreclose on the Trust Deed as allowed under paragraph 5.1 of the Plan.

17. Thereafter, the Trustee's Sale was re-noticed, posted and published as required by statute. See Exhibits "H" through "J". Said Trustee's Sale was held October 23, 1987.

18. After the sale, McDERMOTT approached Meridian Title Company (hereinafter "Meridian"), designated escrow agent in the Escrow Agreement (attached as Exhibit "A" hereto) for a policy of title insurance with respect to the property. In issuing the policy and providing fee simple title, Meridian required releases from ZIONS and the IRS of any interest they may claim with respect to the property.

19. In order to obtain these releases, the parties entered into an original Escrow Agreement dated December 31st attached as Exhibit "K" hereto to provide for a determination of the priorities of the parties to the cash proceeds.

20. McDERMOTT is currently working with the IRS to abrogate the tax liability claimed by the IRS. McDERMOTT contests the amounts assessed and the validity of the liens.

21. The terms of the December 31st Escrow Agreement Exhibit "K" represented a full and complete understanding as to the terms and conduct of the parties with respect to their rights against the proceeds to be deposited herewith and was intended and executed by all parties with an intent to be bound thereby.

22. Thereafter the IRS through various individuals refused to abide by terms of said Escrow and a new Escrow Agreement dated March 4th, Exhibit "A" was executed.

23. Pursuant to the terms of the new Escrow Agreement, (Exhibit "A") Defendant ZIONS was to provide the title company with a release as to the real property which is the subject matter of this dispute. A copy of this release is attached as Exhibit "L" hereto.

24. Pursuant to the terms of the new Escrow Agreement (Exhibit "A"), the IRS was to provide the title company with a Certificate of Discharge with respect to the real property and the lien filed by the IRS as described herein. A copy of this release is attached as Exhibit "M" hereto.

25. STEVEN F. ALDER has rendered service on behalf of McDERMOTT as described herein culminating in negotiating the Escrow Agreement and preparing in-

terpleader action for which he has expended considerable sums and for which payment was to be made out of the proceeds of this sale and which have not been received. See Exhibit "N".

CROSS-CLAIM

26. Defendant STEVEN F. ALDER for cause of action against the United State of America by and through the Internal Revenue Service realleges and by this reference incorporates paragraphs 1 through 24 herein and further alleges as follows:

27. Defendant STEVEN F. ALDER (hereafter "ALDER"), Cross-Claimant, is an attorney licensed within the state of Utah.

28. Cross-Claim Defendant UNITED STATES OF AMERICAN by and through the Internal Revenue Service (hereinafter "IRS") by the action of its employees is liable to the Cross-Claimant for breach of the escrow agreement.

29. ALDER performed certain services as described herein and as disclosed by the attached statements for BRUCE J. and BETTY B. McDERMOTT for the period April 1, 1986 through March 31, 1988. Cheryl M. Brower (hereafter "Brower") is an attorney licensed to practice within the State of Utah and at all relevant times hereto was employed by STEVEN F. ALDER to help represent BRUCE J. and BETTY B. McDERMOTT. The reasonable value of these services, after giving offsets and credits for services performed in connection with matters unrelated to this dispute is $11,815.48 through February 29, 1988. (See statements attached hereto as Exhibits "N-1 through N-16".)

30. In negotiating and representing McDERMOTT, all parties to the Escrow Agreement agreed that compensation for said services rendered as described herein would be paid to STEVEN F. ALDER out of the proceeds of the sale to Hansen prior to the funds being placed with

the court in connection with this interpleader action. Said amount was not fully calculated but was approximated to be not less than $9,000.

31. At no time did the IRS through its agents request that the Escrow Agreement be modified to omit the provision allowing for attorneys fees. See affidavit of Cheryl M. Brower.

32. After the Escrow Agreement, dated December 31, 1987, was signed by all parties including the IRS by its agent Clesse Hilton as acting chief of Special Procedures, the IRS through its agents informed ALDER that it did not consider the Escrow Agreement binding, and requested changes. The modified agreement, again providing for attorneys fees, was accepted by all parties.

33. Thereafter, the IRS through its agents, after requesting additional modifications to the escrow refused to comply with the terms of the escrow and provide the certificate of discharge as required by the terms of the escrow unless ALDER waived his attorneys fees and plead himself as a defendant in this action.

34. Defendant IRS, by refusing to comply with said escrow breached the Escrow Agreement.

35. As a result of said breach, ALDER has been damaged as follows:

A. If ALDER's priority is adjudged inferior to the position of ZIONS and the IRS in an amount not less than $11,815.40, together with the costs and expenses of bringing this action.

B. If ALDER prevails in the above litigation and is awarded his fees out of the proceeds of the interpleader action prior to ZIONS or the IRS or both of them for the amount of the costs and expenses of bringing this action.

WHEREFORE, by reason of these conflicting claims of Defendants and the unsure status of McDERMOTT's tax liability to the IRS, Plaintiffs are in great doubt as

to the priorities of the Defendants and are uncertain which Defendant, if any, is entitled to be paid from the cash proceeds deposited herewith and, therefore, Plaintiffs demand that the court adjudge and order:

1. That each of the Defendants be restrained from instituting any action against Plaintiffs for the recovery of said cash proceeds until a final determination as to priority and entitlement said Defendants may have to said cash proceeds, including the extent of the Plaintiffs' liability is determined by the IRS, its hearing officers, or otherwise.

2. That the Plaintiffs' liability to the IRS is not fixed and that the lien filed is null and void as to the property and the proceeds and that the IRS be further required to disgorge a previous levy of $38,235.14 and place said amount with the registrar of the court until such time as a binding final determination of tax liability can be made as between McDERMOTT and the IRS.

3. That the court make a determination of the priorities of the Defendants subject to the final determination of the Plaintiffs' liability to the Defendant IRS.

4. For judgment in favor of ALDER against the IRS as prayed in Cross-Claim for plaintiff's attorneys fees.

5. That Plaintiffs recover their costs.

6. For such other and further relief as is proper in the premises.

DATED THIS 5th day of April, 1988.

/s/ Steven F. Alder
STEVEN F. ALDER
Attorney for Plaintiffs

Plaintiffs' Address:

1008 South 1900 East
Salt Lake City, UT

ESCROW AGREEMENT
AND INSTRUCTIONS TO TITLE COMPANY

THIS AGREEMENT made this 4th day of March, 1988, between Bruce J. McDermott and Betty B. McDermott (hereinafter referred to as "McDermott"), Alder & Brower (hereinafter referred to as "Alder") the Internal Revenue Service (hereinafter referred to as "IRS") and Zions First National Bank (hereinafter referred to as "Zions").

WHEREAS, on or about the 21st day of August, 1981, McDermott, as Seller entered into a Uniform Real Estate Contract with Ron W. Christensen and Gary L. Carter (hereinafter referred to as "Christensen"), as buyers for the sale and purchase of a certain parcel of real property and improvements affixed thereto located in Salt Lake County, State of Utah, more particularly described in Exhibit "A" attached hereto (hereinafter referred to as the "Property"); and

WHEREAS, in compliance with a term of said Uniform Real Estate Contract, also on the 21st day of August, 1981, Christensen executed in favor of McDermott a Promissory Note in the amount of $146,000.00 secured by a Trust Deed covering Christensen's interest in the Property under the said Contract; and

WHEREAS, Christensen defaulted in performance of the obligations set forth in said Trust Deed and Promissory Note; and

WHEREAS, the Property was duly sold in accordance with the Laws of the State of Utah at a Trustee's Sale on September 23, 1987, to Bruce J. McDermott on the foreclosure of the said Trust Deed through a bid by Bruce J. McDermott in the amount of $305,074.63 at the Trustee's Sale (a copy of the Trustee's Deed is attached as Exhibit "B" hereto) which bid included the assumption of an underlying obligation against the Property in the approximate amount of $119,950.00 and the remainder

as a credit bid of approximately $185,124.63 as against the defaulted Trust Deed obligation; and

WHEREAS, McDermott has entered into a certain Earnest Money Sales Agreement with Robert R. Hansen and Helen A. Hansen (hereinafter referred to as Hansen) dated September 17, 1987 (attached as Exhibit "C") for the sale of the Property with the condition that title to the Property be fully marketable and insurable in fee simple; and

AND WHEREAS, Zions claims a lien by virtue of a judgment entered against Bruce J. McDermott on June 22, 1987, in the amount of $67,977.67 docketed in Book 213 at Page 2400, and the IRS filed a lien against McDermott on September 9, 1987, in the amount of $103,657.93, within 30 days prior to said Trustee's Sale as Entry No. 4519592 (the IRS having released its redemption rights as to other tax liens to which it received notice as required by statute (see Exhibit "D" hereto);

AND WHEREAS, Meridian, as title insurer, requires a release of the Property from the Zion's Judgment Lien and a discharge of the McDermott tax lien filed September 9, 1987, described in the next preceding paragraph hereto;

AND WHEREAS, Alder claims a portion of the proceeds of the proposed sale for legal services performed by Alder as attorney for McDermott, pursuant to Utah Code Annotated § 57-1-29 and other laws of the State of Utah;

AND WHEREAS, the transaction between McDermott and Hansen is an "arms length" transaction at the fair market value of said property and the parties desire to comply with requirements of Meridian to insure clear title in Hansen;

AND WHEREAS the Escrow Agent is a licensed title company doing business in the State of Utah and is prepared to provide a policy of title insurance on the property provided that the conditions of this agreement

are satisfied and is otherwise prepared to proceed in accordance with this agreement;

NOW, THEREFORE, for good and valuable consideration, the adequacy of which is hereby acknowledged,

IT IS MUTUALLY AGREED AS FOLLOWS:

1. McDermott shall deliver to Meridian Title Company (hereinafter referred to as "Escrow Agent") which Meridian shall cause to be recorded as required herein at the offices of the Salt Lake County Recorder, the following: the Trustee's Deed a copy of which is attached as Exhibit "B" hereto, and a Warranty Deed conveying title to the above-referenced properties to Robert R. Hansen and Helen A. Hansen, as joint tenants.

2. The sum of $270,000.00 is hereby delivered to Escrow Agent. Escrow Agent is hereby instructed to distribute the following amounts in the following priorities from said sum:

(a) Property taxes due for the years 1986 and 1987 and pro-rated taxes for 1988 in the total amount of $10,089.66, together with all other necessary and customary prorations as of the date of closing the sale;

(b) Amounts necessary to obtain a release and Reconveyance of the Trust Deed recorded in favor of First Security Bank of Utah in Book 3690, Pages 108-110 of the official records of the Salt Lake County Recorder's Office, together with attorney's fees, in the approximate amount of $119,950.00 (assigned to Lomas & Nettleton);

(c) $980.00 to Escrow Agent for the purchase of the Policy of title insurance;

(d) Recording fees, closing costs, attorneys fees, and costs of escrow in the amount of $700.00 to Escrow Agent;

(e) Costs of repair or replacement of the heating equipment located in the building on the Property

which must be in working order for the consummation of the sale in an amount not to exceed $4,900.00 to the entity providing said materials and services; and

(f) Escrow Agent shall hold all remaining amounts and distribute them as directed in paragraph 7 herein.

3. It is understood that the releases delivered herewith by the IRS and Zions are unconditional. The monies placed in escrow shall be in lieu of all legal or equitable rights of the IRS and Zions to the real property released by them as part of this agreement. Neither party hereto waives any rights, defenses and claims that they may have had or any of them may have had in any interest in and to the real property, such rights being reserved and shall apply to the cash proceeds being held in escrow in substitution of the subject real property. The respective priorities of the parties to the cash proceeds shall be identical to the priorities of the respective liens of the parties as they existed against the real property as of September 23, 1987, after Bruce J. McDermott successfully bid and purchased the property at the Trustee's Sale, notwithstanding the change in form of collateral.

4. The IRS hereby delivers to the Escrow Agent a Certificate of Discharge releasing any and all interest of the IRS as to the property described herein.

5. Zions hereby delivers to the Escrow Agent a Partial Release releasing any and all of its Judgment lien as against the above referenced property.

6. Escrow Agent is instructed to record in this Order the Trustee's Deed, Partial Release and Certificate of Discharge and Warranty Deed only upon the occurrence of the following conditions:

(a) Escrow Agent has received a fully executed Escrow Agreement;

(b) Escrow Agent has received the sum of $270,000.00 as described herein, and;

(c) Escrow Agent has received all documents required under this Agreement.

7. Escrow Agent shall hold all cash proceeds after payment of the items set forth in paragraph 2 herein until presented with an order of the United States District Court directing the payment of said cash proceeds to the Clerk of the United States District Court or other designated party. An interpleader action shall be filed with the United States District Court by McDermott immediately after all terms of paragraph 6 of this Agreement have been satisfied.

8. Notice to the Escrow Agent shall be deemed given only when sent to Escrow Agent by certified mail, return receipt requested and postage prepaid, and addressed to the Escrow Agent at 64 East 6400 South, Suite 300, Salt Lake City, UT 84107, or such other address as the Escrow Agent may inform the parties of in writing.

9. Escrow Agent, its officers, agent and employees, are to act hereunder as depository only and are not responsible or liable in any manner for the sufficiency or execution of the obligations of the parties hereunder, except to hold in escrow the funds deposited and deliver them to the parties as required hereby.

10. These funds shall be held in an interest-bearing account until distribution to the United States District Court. Thereafter, if interest is permitted to be paid by the Court, the funds shall be placed in an interest-bearing account and all interest earned shall be subject to the reasonable charges of Escrow Agent for the establishment and handling of this escrow.

11. This Agreement may be modified only in writing signed by the parties, and the Escrow Agent shall be given notice as described in paragraph 9 herein of any modification.

12. This Agreement shall be construed in accordance with the laws of the State of Utah.

IN WITNESS WHEREOF, the parties have set their hands and seals and caused the foregoing instrument to

be executed on its behalf by its authorized officers this 4th day of March, 1988.

/s/ Betty B. McDermott
BETTY B. McDERMOTT

/s/ Bruce J. McDermott
BRUCE J. McDERMOTT
ADLER & BROWER

By: /s/ Steven F. Alder
STEVEN F. ALDER
Its: owner

ZIONS FIRST NATIONAL BANK

By: /s/ Allen L. Pitt
Its: V.P.

INTERNAL REVENUE SERVICE

By: /s/ [Illegible]
Its:

STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

Personally appeared before me Bruce J. McDermott who states that he had read the foregoing instrument and executed the same.

Subscribed and sworn to before me this 4th day of March, 1988.

/s/ Steven F. Alder
Notary Public

My Commission Expires:
2-1-90

Residing At:
Salt Lake City

STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

Personally appeared before me Betty B. McDermott who states that she had read the foregoing instrument and executed the same.

Subscribed and sworn to before me this 4th day of March, 1988.

/s/ Steven F. Alder
Notary Public

My Commission Expires:
2-1-90

Residing At:
Salt Lake City

STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

On the 3rd day of March, 1988, personally appeared before me Allen L. Potts, who being by me duly sworn did say that he is the Vice President of Zions First National Bank, the national association that executed the above and foregoing instrument, and that said instrument was signed in behalf of said national association by authority of a resolution of its board of directors and said Allen L. Potts acknowledged to me that said national association executed the same.

/s/ [Illegible]
Notary Public

My Commission Expires: Residing At:

2-10-92 Utah County

STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

On the 4 day of March, 1988, personally appeared before me Richard Heldman, who being by me duly sworn did say that he is the Chief Special Procedures of the Internal Revenue Service, a government agency of the United States Treasury Department that executed the above and foregoing instrument, and that said instrument was signed in behalf of said governmental agency of the United States Treasury Department by authority of its seal and said Richard Hedman acknowledged to me that said governmental agency of the United States Treasury Department executed the same.

/s/ [Illegible]
Notary Public

My Commission Expires: Residing At:

August 7, 1988 Salt Lake City, Utah

STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

On the 4th day of March, 1988, personally appeared before me Steven F. Alder, who being by me duly sworn did say that he is the owner of Alder & Brower, a sole proprietor that executed the above and foregoing instrument, authority of its partnership agreement and said Steven F. Alder acknowledged to me that said partnership executed the same.

/s/ [Illegible]
Notary Public

Residing At:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. 88C-399G

BRUCE J. MCDERMOTT, ET AL., PLAINTIFFS

vs.

ZIONS FIRST NATIONAL BANK, N.A., ET AL., DEFENDANTS

AFFIDAVIT OF PHILLIP MEEKS IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

PHILLIP MEEKS, being first duly sworn on oath, deposes and says:

1. Affiant is a loan officer employed by Zions First National Bank, a national banking association (hereinafter "Zions"), and has personal knowledge of all statements of fact set forth herein.

2. On June 2, 1987, the Honorable Raymond S. Uno, Judge of the Third Judicial District Court of Salt Lake County, State of Utah executed and entered an Order and Summary Judgment in favor of Zions and against Bruce McDermott in the total amount of $67,977.67 together with post-judgment interest accruing at the rate of twelve percent (12%) per annum and reasonable attorney's fees incurred in the collection of said judgment.

A true and correct copy of said Order and Summary Judgment is attached hereto as Exhibit "A".

3. The Clerk of the Third District Court docketed said Order and Summary Judgment in Book 213 as No. 2402 on July 6, 1987 at 8:05 a.m.

4. On September 9, 1987, the United States of America, by and through the Internal Revenue Service (hereinafter "IRS") filed a Notice of Federal Tax Lien Under Internal Revenue Laws against Bruce J. McDermott and Betty B. McDermott with the Salt Lake County Recorder's Office, as Entry No. 4519592, alleging an unpaid balance of assessment in the amount of $103,657.93. A true and correct copy of said Notice of Federal Tax Lien as is on file at the Recorder's office is attached hereto as Exhibit "B".

DATED this 2nd day of September, 1988.

/s/ Phillip Meeks
PHILLIP MEEKS

SUBSCRIBED AND SWORN to before me this 2nd day of September, 1988.

/s/ [Illegible]
Notary Public
Residing at: SLC Utah

(Certificate of Mailing Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

No. 88C-399G

BRUCE J. MCDERMOTT, ET AL., PLAINTIFFS

vs.

ZIONS FIRST NATIONAL BANK, N.A., ET AL., DEFENDANTS

JUDGMENT AND DIRECTIVE OF PAYMENT

The above-entitled matter came on regularly for hearing on Defendants' respective Motions for Summary Judgment on December 1, 1988; Plaintiff being represented by counsel, Steven F. Alder; Steven F. Alder also appearing pro se; the United States being represnted by Kirk C. Lusty; and Zions First National Bank ("Zions") being represented by T. Richard Davis; Alder having withdrawn his Motion for Summary Judgment; the Court having heard argument of counsel and having reviewed the legal memoranda submitted by the United States and Zions; and being fully advised in the premises, entered its Memorandum Decision and Order granting Zion's Motion and denying United States' Motion on January 17, 1989.

NOW THEREFORE based on said Memorandum Decision and Order and supported by the Supplemental Affidavit of T. Richard Davis regarding attorneys' fees, Judgment is hereby entered as follows:

1. The lien of Zions on the proceeds held by the Clerk of this Court is prior in right to that of the United States.

2. The claim of Steven F. Alder to the proceeds held by this Court, if any claim is found to be recoverable by Alder, may be prior in right to that of Zions'; however, sufficient proceeds are held by the Court to more than satisfy the claims of Zions and Alder.

3. Zions is entitled to immediate payment of its lien in the following amount:

Original Judgment	$67,977.67
Interest at 12% from June 22, 1987 through February 1, 1989	$13,141.11
Reasonable Attorneys' Fees and Costs	$ 5,814.35
Total lien claims	$86,933.13

4. The Clerk of this Court is hereby ordered to make immediate payment of $86,933.13 to Zions First National Bank and retain the remainder of the funds held in this matter for future determination of this Court.

DATED: February 8, 1989.

/s/ J. Thomas Greene
J. THOMAS GREENE
United States District Judge

(Certificate of Mailing Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. 88C-399G

BRUCE J. MCDERMOTT, ET AL., PLAINTIFFS

v.

ZIONS FIRST NATIONAL BANK, N.A., ET AL., DEFENDANTS

ORDER

This matter came before the United States District Judge J. Thomas Greene on November 13, 1989 pursuant to a pre-trial conference with Steven F. Alder representing the plaintiff and appearing pro se as a defendant and cross-claim plaintiff and Kirk C. Lusty, Trial Attorney, Tax Division, United States Department of Justice. At the pretrial conference Steven F. Alder informed the Court that the plaintiffs no longer wished to pursue the above-entitled action and that he, personally, no longer wished to pursue his cross-claim against the United States. Therefore, it is hereby ordered:

1. The cross-claim of Steven F. Alder against the United States is dismissed with prejudice;

2. The complaint of plaintiffs Bruce J. McDermott and Betty M. McDermott, insofar as that complaint seeks relief against the United States, is dismissed with prejudice; and

3. The Clerk of the Court is directed to pay to the United States. c/o Kirk C. Lusty, Trial Attorney, Tax Division, U.S. Department of Justice, P.O. Box 683, Ben Franklin Station, Washington, D.C. all funds now held by the Clerk of the United States District Court in the above-entitled action.

Dated this 20th day of Nov., 1989.

BY THE COURT

/s/ J. Thomas Greene
J. THOMAS GREENE
United States District Judge

APPROVED AS TO FORM:

/s/ Steven F. Alder
STEVEN F. ALDER
Attorney for Plaintiffs and
Defendant and Cross-Claim
Plaintiff Pro Se

(Certificate of Mailing Omitted in Printing)

SUPREME COURT OF THE UNITED STATES

No. 91-1229

UNITED STATES by and through INTERNAL REVENUE SERVICE, PETITIONER

v.

BRUCE J. MCDERMOTT, *et al.*

ORDER ALLOWING CERTIORARI

Filed May 26, 1992

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

May 26, 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 47012

Supreme Court, U.S.
FILED
JUL 22 1992
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No. 91-1229

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, BY AND THROUGH INTERNAL REVENUE SERVICE, PETITIONER

v.

BRUCE J. MCDERMOTT AND BETTY MCDERMOTT AND ZIONS FIRST NATIONAL BANK, N.A.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

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QUESTION PRESENTED

Whether, under Section 6323(a) of the Internal Revenue Code, 26 U.S.C. 6323(a), a judgment lien of a private creditor that predates a federal tax lien has priority over the tax lien with respect to real property interests acquired by the taxpayer after notice of the tax lien was properly filed.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1229

UNITED STATES OF AMERICA, BY AND THROUGH INTERNAL REVENUE SERVICE, PETITIONER

v.

BRUCE J. MCDERMOTT AND BETTY MCDERMOTT AND ZIONS FIRST NATIONAL BANK, N.A.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 945 F.2d 1475. The opinion of the district court (Pet. App. 16a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 25a-26a) was entered on October 2, 1991. On December 19, 1991, Justice White extended the time for filing a petition for a writ of certiorari to and including January 30, 1992. The petition was filed on January 29, 1992, and was granted on May 26, 1992.

The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 6321 and 6323(a) of the Internal Revenue Code, 26 U.S.C. 6321 and 6323(a), and Section 301.6323(h)-1(g) of the Treasury Regulations on Procedure and Administration, 26 C.F.R. 301.6323 (h)-1(g), are set forth at Pet. 2-3.

STATEMENT

1. a. In 1981, Bruce J. and Betty McDermott entered into a contract to sell certain real estate (the "South Street property") that they owned in Salt Lake City, Utah. Upon their entering into the contract of sale, the McDermotts' interest in the property became an interest in personalty under Utah law. The McDermotts retained legal title to the property only as security for payment of the purchase price. On September 23, 1987, after the buyers defaulted on the contract of sale, the McDermotts reacquired the property through foreclosure (Pet. App. 3a-4a, 17a-18a). Upon foreclosure, the McDermotts' interest in the property converted back into a real property interest under state law (*ibid.*).

b. On June 22, 1987, *before* the McDermotts reacquired the South Street property, respondent Zions First National Bank, N.A. (Bank) obtained a state court judgment for $67,977.67 against the McDermotts. The Bank docketed that judgment in state district court on July 6, 1987 (Pet. App. 2a-3a, 17a-18a).

c. On September 9, 1987, also *before* the McDermotts reacquired the South Street property, the Internal Revenue Service (IRS) filed in the records of

Salt Lake County a notice of federal tax lien in the amount of $103,657.93. Pursuant to the tax assessment previously made by the Commissioner in December 1986, the notice of lien reflected the McDermotts' unpaid taxes for the years 1977 through 1981 (Pet. App. 2a-4a, 17a-18a).

2. In March 1988, having made a contract to sell the South Street property to a new buyer, the McDermotts sought to obtain releases of the liens on the property (Pet. App. 18a). To permit the sale to occur, the IRS and the Bank entered into an escrow agreement with the McDermotts under which the IRS and the Bank released their claims on the real property but reserved their rights to the cash proceeds of the sale. Under the escrow agreement, the priority of the creditors' claims in the sale proceeds is (Pet. App. 18a-19a n.2):

> identical to the priorities of the respective liens [of the parties] as they existed against the real property as of September 23, 1987, after Bruce J. McDermott successfully bid and purchased the property at the Trustee's Sale, notwithstanding the change in form of collateral.

Pursuant to the escrow agreement, the McDermotts instituted this interpleader proceeding in state court by depositing the net proceeds of the sale ($135,575.50) with the court. The United States then removed the case to federal district court (Pet. App. 2a-3a, 18a).

3. The district court held that the Bank's judgment lien had priority over the federal tax lien in the net proceeds of the sale (Pet. App. 16a-24a). The court acknowledged that, under Utah law, the docketing of the Bank's judgment created a lien in its favor only with respect to real property

in which the McDermotts owned an interest (Pet. App. 19a-20a). The court also recognized that the McDermotts had no real property interest in the South Street property at the time the judgment was docketed because their interest in the existing real estate sales contract was personalty, not realty, under Utah law (*ibid.*). In contrast with the limited character of the Bank's lien under state law, the lien of the United States for unpaid income taxes attaches to "all property and rights to property, whether real or personal, belonging to" the delinquent taxpayer (26 U.S.C. 6321).[1] The district court concluded, however, that the United States had waived its prior right to the proceeds of the McDermotts' "personalty" interest in the first contract of sale for the South Street property by stipulating in the escrow agreement that the parties' priorities are to be determined "as they existed against the real property as of September 23, 1987" (Pet. App. 18a-19a n.2).[2] The

[1] The federal tax assessment was made on December 9, 1986, and, under 26 U.S.C. 6322, the federal tax lien therefore came into existence on that date. The district court attributed no significance to this fact (Pet. App. 22a n.7).

[2] In our view, the district court erred in reaching that conclusion, for the escrow agreemment also provides that "[n]either party hereto waives any rights, defenses and claims that they may have had * * * in and to the real property, such rights being reserved and shall apply to the cash proceeds being held in escrow in substitution of the subject real property" (Pet. App. 6a). In our view, this case should have been decided in favor of the United States on the ground that its lien attached to the taxpayers' interest in the property before they converted that interest into a real property interest—the only type of interest to which the Bank's lien could have attached (*Cannefax* v. *Clement*, 818 P.2d 546 (Utah 1991), aff'g 786 P.2d 1377, 1380 (Utah Ct. App. 1990);

court therefore considered this case simply as one involving competing liens that attached simultaneously to real property acquired by the McDermotts after the judgment lien and federal tax lien had both been properly placed of record (*id.* at 18a-19a, 21a, 22a).

Viewing the case in this manner, the court concluded that the priority of the competing liens on real property acquired *after* the two liens were filed should be resolved under the rule of "first in time, first in right" (Pet. App. 22a). Because the Bank's judgment had been docketed before notice of the federal tax lien was filed, the court concluded that the judgment lien had priority and therefore must be satisfied in full prior to any distribution to the IRS (*id.* at 22a-23a).

4. The court of appeals affirmed (Pet. App. 1a-15a). While stating that this Court has not addressed the particular situation presented in this case —where a judgment lien and a later-filed tax lien give rise to conflicting claims to after-acquired property—the court of appeals nonetheless interpreted

Butler v. *Wilkinson*, 740 P.2d 1244, 1254 (Utah 1987)). Under the district court's analysis of the escrow agreement, however, the federal tax lien was not treated as a continuation of its lien against the taxpayers' personality interest in the contract of sale, but as if it had newly attached to the property only as of the time it was converted into a real property interest. The court of appeals accepted the district court's interpretation of the escrow agreement (Pet. App. 6a).

It is, of course, only as a result of the lower courts' interpretation of the escrow agreement that the "after-acquired" property question arises in this case. Since the analysis of the escrow agreement presents narrow issues that lack general importance, however, we have not sought further review of the lower courts' interpretation of that agreement. See Pet. 5-6 n.3.

United States v. *Vermont*, 377 U.S. 351 (1964), to stand for the proposition that a "non-contingent" lien on all of a person's real property that is "perfected prior to the federal tax lien, will take priority over the federal lien, regardless of whether after-acquired property is involved" (Pet. App. 10a). The court of appeals held that, because the Bank's lien was "non-contingent" (in the sense that the judgment had been properly docketed, was specific in amount, and was applicable to real property owned by the McDermotts), the Bank's lien had priority even with respect to property first acquired by the McDermotts after notice of the federal tax lien had been filed (*id.* at 11a-13a).[3]

SUMMARY OF ARGUMENT

The federal tax lien arises upon the assessment of taxes and applies to "all property and rights to property, whether real or personal" belonging to the delinquent taxpayer. 26 U.S.C. 6321, 6322. The federal tax lien has priority over the judgment lien of a private creditor unless, before notice of the tax lien is filed, the private lien has been "perfected in the sense that there is nothing more to be done [to establish] the identity of the lienor, the property subject to the lien, and the amount of the lien." *United States* v. *City of New Britain*, 347 U.S. 81, 84 (1954). Even if the private lien has otherwise been perfected,

[3] In so holding, the court of appeals rejected (Pet. App. 13a-14a) the conclusion of the Fifth Circuit in *Southern Rock, Inc.* v. *B & B Auto Supply*, 711 F. 2d 683 (1983), that, when a private lien and a federal tax lien are filed and perfected in existing property at the same time, the competing lienors are to share the proceeds of the sale of the property in proportion to their claims (Pet. App. 13a-14a).

it acquires no priority over the federal tax lien if the "property subject to the lien" has not been identified, and the lien has not "attached to the property in question," *before* notice of the federal tax lien is filed. *Id.* at 86.

Although the judgment lien involved in this case was filed before notice of the federal tax lien was filed, the taxpayer did not acquire "the property in question" until *after* notice of the federal tax lien was filed. Because the taxpayer did not own the property in question until *after* the notice of tax lien was filed, the judgment lien did not attach to the property until after the tax lien was filed. The federal tax lien therefore has priority under Section 6323(a) of the Internal Revenue Code.

ARGUMENT

UNDER SECTION 6323(a) OF THE INTERNAL REVENUE CODE, THE JUDGMENT LIEN OF A PRIVATE CEDITOR DOES NOT HAVE PRIORITY OVER A FEDERAL TAX LIEN WITH RESPECT TO PROPERTY ACQUIRED BY THE TAXPAYER AFTER NOTICE OF THE FEDERAL TAX LIEN IS FILED

A. The Federal Tax Lien Has Priority Over A Prior-Filed Judgment Lien With Respect To Property Acquired By The Taxpayer After Notice Of The Tax Lien Is Filed

1. Section 6321 of the Internal Revenue Code establishes "a lien in favor of the United States upon all property and rights to property, whether real or personal" belonging to a taxpayer who, after demand, "neglects or refuses to pay" taxes owed to the United States. 26 U.S.C. 6321. Under Section 6322 of the Code, this broad federal lien arises "at the time the assessment is made" and continues until the taxes are paid or the lien becomes unenforceable by passage

of time. 26 U.S.C. 6322.[4] The federal tax lien attaches to all property owned by the debtor at the time the lien arises, and also to all other property thereafter acquired by the taxpayer. *Glass City Bank* v. *United States*, 326 U.S. 265, 268 (1945) ("the lien applies to property owned by the delinquent at any time during the life of the lien"); *Graves* v. *Commissioner*, 12 B.T.A. 124, 133 (1928) (the federal tax lien applies "of course, to all the property that the tax debtor subsequently acquires").

Sections 6321 and 6322 of the Code originated with the Act of July 13, 1866, ch. 184, § 9, 14 Stat. 107.[5] The provisions of that Act did not indicate whether the federal tax lien takes priority over claims of other creditors asserted in the same property. In *United States* v. *Snyder*, 149 U.S. 210 (1893), however, this Court held that the federal tax lien that arises upon assessment has priority in all of the taxpayer's property even without notice to other creditors, and even over the rights of a subsequent bona fide purchaser for value who took without notice of

[4] Section 6322 of the Internal Revenue Code provides that, "[u]nless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time." 26 U.S.C. 6322.

[5] The relevant text of that statute was as follows: "And if any person, bank, association, company, or corporation, liable to pay any tax, shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with the interest, penalties, and costs that may accrue in addition thereto, upon all property and rights to property belonging to such person, bank, association, company, or corporation." § 9, 14 Stat. 107.

the lien. *Id.* at 213-214. Sections 6321 and 6322 have not been altered in any material respect since *Snyder* and therefore incorporate this broad principle.

While the general principle established in *Snyder* thus remains effective, it has been limited somewhat by a variety of provisions enacted by Congress (now set forth in Section 6323 of the Code) that subordinate the federal tax lien to the claims of other creditors in specific, carefully delineated circumstances. The present case concerns the provisions of Section 6323(a), which had its origin in the Act of Mar. 4, 1913, ch. 166, § 3186, 37 Stat. 1016. The 1913 Act was enacted specifically to limit the potential harshness of the *Snyder* decision in three narrow situations. See H.R. Rep. No. 1018, 62d Cong., 2d Sess. 2 (1912). The 1913 Act accepted the general rule of *Snyder*, but modified it in part by providing that the federal tax "lien shall not be valid as against any mortgagee, purchaser or judgment creditor until notice of such lien shall be filed." § 3186, 37 Stat. 1016. With only slight changes in phrasing, this provision has been carried forward to Section 6323 (a) of the current Code.[6]

In its current form, Section 6323(a) provides that the federal tax lien "shall not be valid as against any purchaser, holder of a security interest, mechanic's

[6] The extensive changes to Section 6323 that were enacted by Congress in 1966 are discussed at pages 15-18, *infra*. These changes did not alter the scope of the priority afforded the federal tax lien under Section 6323(a), but added numerous additional protective provisions for private creditors in Section 6323(c)-(h). Although the changes enacted in 1966 are not directly relevant to the question presented in this case, they confirm that the tax lien has priority over prior-filed judgment liens with respect to property acquired after notice of the tax lien is filed. See pages 15-18, *infra*.

lienor, or judgment lien creditor until notice" of the federal tax lien has been properly filed in local property records.[7] 26 U.S.C. 6323(a). The origin and history of the federal tax lien provisions reflect a studied intent by Congress to exclude from the effect of the federal tax lien *only* those third-party "interests which [Congress] specifically included in [Section 6323] *and no others.*" *United States* v. *Security Trust & Savings Bank*, 340 U.S. 47, 53 (1950) (Jackson, J., concurring) (emphasis added). Accord, *United States* v. *City of New Britain*, 347 U.S. 81, 88 (1954); *United States* v. *Gilbert Associates, Inc.*, 345 U.S. 361, 364 (1953); 14 J. Mertens, *The Law of Federal Income Taxation* § 54A.03, at 15-16 (1991).

Under Section 6323(a), when a private lien of the type described in that Section has been "perfected" in the taxpayer's property *before* notice of the federal tax lien is filed, the private lien is entitled to priority with respect to that property under the general rule that "the first in time is the first in right." *United States* v. *City of New Britain*, 347 U.S. at 85. For the private lien to be perfected in the taxpayer's property, and thereby obtain priority over a later-filed tax lien, the lien must be certain and specific as to the identity of the lienor, the amount of the lien, and the collateral or property to which it applies. *Id.* at 84.[8] To obtain priority over the federal tax

[7] The filing procedures to be followed by the Internal Revenue Service in giving notice of the federal tax lien are set forth in Section 6323(f) of the Code. See 26 U.S.C. 6323(f). It is not disputed that these statutory procedures were followed in this case and that notice of the federal tax lien was properly filed.

[8] The Court has referred to these requirements in distinguishing between liens that are "choate" and "inchoate." To

lien under Section 6323(a), the private lien must be (*United States* v. *City of New Britain*, 347 U.S. at 84):

> perfected in the sense that there is nothing more to be done [to establish] the identity of the lienor, the property subject to the lien, and the amount of the lien * * *.

See also *United States* v. *Pioneer American Ins. Co.*, 374 U.S. at 89. Whether the private lien is "sufficiently specific and perfected" prior to the date of notice of the tax lien, and thus obtains priority under Section 6323(a), is a question of federal law, not state law. *United States* v. *Waddill, Holland & Flinn, Inc.*, 323 U.S. 353, 356-357 (1945). See also *United States* v. *Pioneer American Ins. Co.*, 374 U.S. at 88 ("it is a matter of federal law when such a lien has acquired sufficient substance and has become so perfected as to defeat a later-arising or later-filed federal tax lien").

Even if the private lien has otherwise been perfected, it acquires no priority over the federal tax lien if the "property subject to the lien" has not been

be perfected against a federal tax lien, the private judgment lien must have "attached to the property in question and bec[o]me choate" before notice of the federal tax lien is filed. *United States* v. *Pioneer American Ins. Co.*, 374 U.S. 84, 88 (1963) (quoting *United States* v. *City of New Britain*, 347 U.S. at 86). The Court has invoked and applied these requirements frequently. See, *e.g.*, *United States* v. *Acri*, 348 U.S. 211 (1955); *United States* v. *Liverpool & London & Globe Ins. Co.*, 348 U.S. 215 (1955); *United States* v. *Scovil*, 348 U.S. 218 (1955); *Aquilino* v. *United States*, 363 U.S. 509 (1960); *United States* v. *Durham Lumber Co.*, 363 U.S. 522 (1960); *United States* v. *Vermont*, 377 U.S. 351, 357 (1964); *United States* v. *Equitable Life Assurance Society*, 384 U.S. 323 (1966).

identified, and the lien has not "attached to the property in question," before notice of the federal tax lien is filed. *United States* v. *City of New Britain*, 347 U.S. at 86. See also *United States* v. *Equitable Life Assurance Society*, 384 U.S. 323, 328 (1966); *Illinois* v. *Campbell*, 329 U.S. 362, 373 (1946). When the "property subject to the lien" has not been identified and the lien has not "attached to the property in question" before notice of the federal lien is filed, the private lienor has only the hope "of a more perfect lien to come" (*United States* v. *Security Trust & Savings Bank*, 340 U.S. at 50 (quoting *New York* v. *Maclay*, 288 U.S. 290, 294 (1933)).[9] That hope is not sufficient to defeat the federal lien.

The requirements (i) that the private lien be fully perfected, (ii) that it identify the property subject to the lien, and (iii) that it attach to the property before notice of the federal tax lien is filed are federal rules adopted by this Court to implement the priorities established by the federal tax lien provisions. *United States* v. *Pioneer American Ins. Co.*, 374 U.S. at 88. These federal rules, however, are consistent with ordinary commercial law principles. For example, under Section 9-303(1) of the Uniform Commercial Code, a security interest is not perfected until "it has attached" to the property involved. Section 9-203(1)(c) of the Uniform Commercial Code specifies that a security interest in property cannot attach until "the debtor has rights in the collateral." Before the debtor has acquired rights in the property, and the private lien has attached to the property, the

[9] As the Ninth Circuit put it in *United States* v. *J.D. Grainger Co.*, 945 F.2d 259 (1991), the property to which the lien applies must be "definite, and not merely ascertainable in the future." *Id.* at 263.

private lien would not be "enforceable against the debtor or third parties with respect to the collateral" under normal commercial law concepts (U.C.C. § 9-203(1)).

Accordingly, when the taxpayer first acquires ownership of property *after* notice of the federal lien is filed, it is the tax lien, rather than the private lien, that has priority under Section 6323(a).[10] See *United States* v. *City of New Britain*, 347 U.S. at 86 (the priority of the private lien "must depend on the time it attached to the property in question"); *United States* v. *Equitable Life Assurance Society*, 384 U.S. at 328 (same); *Don King Productions, Inc.* v. *Thomas*, 945 F.2d 529, 534 (2d Cir. 1991). Even when "the identity of the [private] lienor was known and the amount of the [private] lien was established," the federal tax lien has priority if "the property subject to the lien was not in existence at the

[10] The one historical exception to this conclusion was for purchase money mortgages. If property is acquired with a purchase money mortgage *after* notice of a tax lien is filed, the mortgage has priority even though the taxpayer had no rights in the property at the time the tax lien was filed. The special treatment afforded to purchase money mortgages is "based upon the concept that the taxpayer has acquired property or a right to property [to which the lien created by Section 6321 may apply] *only to the extent* that the value of the whole property or right exceeds the amount of the purchase money mortgage." H.R. Rep. No. 1884, 89th Cong., 2d Sess. 4 (1966) (emphasis added). See *Allan* v. *Diamond T Motor Car Co.*, 291 F.2d 115 (10th Cir. 1961); Coogan, *The Effect of the Federal Tax Lien Act of 1966 Upon Security Interests Created Under the Uniform Commercial Code*, 81 Harv. L. Rev. 1369, 1374 & n.23 (1968). The Internal Revenue Service has acquiesced in this treatment of purchase money mortgages. See Rev. Rul. 68-57, 1968-1 C.B. 553.

time the government's lien arose." *Ibid.*[11] When the taxpayer acquires rights in the property *after* notice of the federal tax lien is filed, the tax lien and the prior-filed private lien "attach to the [after-acquired property] at the same instant" (Coogan, *The Effect of the Federal Tax Lien Act of 1966 Upon Security Interests Created Under the Uniform Commercial Code*, 81 Harv. L. Rev. 1369, 1383-1384 (1968)). Since the private lien is not perfected until it attaches to the property, and is thus not perfected with respect to after-acquired property *before* notice of the tax lien is filed, "the tax lien takes priority" over the private lien under the express terms of Section 6323(a). Coogan, *supra*, 81 Harv. L. Rev. at 1383-1384. See also *Texas Oil & Gas Corp.* v. *United States*, 466 F.2d 1040, 1052-1054 (5th Cir. 1972); *MDC Leasing Corp.* v. *New York Property Ins. Underwriting Ass'n*, 450 F. Supp. 179, 181 (S.D.N.Y. 1978), aff'd without published opinion, 603 F.2d 213 (2d Cir. 1979) (Table); *United States* v. *Graham*, 96 F. Supp. 318, 321 (S.D. Cal. 1951), aff'd *sub nom. California* v. *United States*, 195 F.2d 530 (9th Cir. 1952), cert. denied, 344 U.S. 831 (1952); *Gaeta* v. *United States*, 50 A.F.T.R. 2d 5509 (W.D.N.Y. 1982); *Iowa Fair Plan* v. *United States*, 257 N.W. 2d 626, 629-630 (Iowa 1977).[12]

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[11] See also Coogan, *supra*, 81 Harv. L. Rev. at 1377, 1384. There can be no "security interest in property if the debtor at the time of its purported creation has no rights therein. * * * [When the security interest and the later-filed tax lien] attach to the [after-acquired property] at the same instant, * * * the tax lien takes priority over the security interest" with respect to that property. *Id.* at 1383-1384.

[12] In *Southern Rock, Inc.* v. *B & B Auto Supply*, 711 F.2d 683, 688-689 (1983), the Fifth Circuit concluded that, in the unusual factual scenario where the private lien and notice of the federal tax lien are filed simultaneously, the liens share pro rata in the proceeds of the taxpayer's property. That conclusion disregards the language of Section 6323(a). "[U]ntil notice" of the federal tax lien is filed, the statute provides protection for specific types of perfected private liens. 26 U.S.C. 6323(a). If the private lien is not perfected "until notice" of the federal lien is filed, it is not protected by the statute. A private lien perfected at the same instant that notice of the federal lien is filed is not protected under Section 6323(a) because the federal lien has "priority," not "parity," when the private lien is not perfected first. *Texas Oil & Gas Corp.* v. *United States*, 466 F.2d at 1047, 1052; see *MDC Leasing* v. *New York Property Insurance Underwriting Ass'n*, 450 F.Supp. at 181.

In any event, the unusual situation presented in *Southern Rock* does not exist in this case. This case does not involve the priorities in *existing* property that result from the simultaneous filing of a perfected private lien and notice of the federal tax lien. Instead, this case concerns a prior-filed private lien that was *not* perfected in the property right at issue, because the property right at issue *did not exist*, until *after* notice of the federal tax lien was filed.

2. The structure and history of the Federal Tax Lien Act of 1966 (Pub. L. No. 89-719, § 101, 80 Stat. 1125) confirm that the federal tax lien has priority in property acquired by the taxpayer after notice of the federal lien is filed. In that Act, Congress confirmed the basic "assumption that the general tax lien outranks all competing interests" but adopted several new categories of private interests to be given priority over the federal tax lien in carefully designated situations. Young, *Priority of the Federal Tax Lien*, 34 U. Chi. L. Rev. 723, 724 (1967).[13] These new categories of protected commer-

[13] "The amended tax lien law starts, as the old one did, with an assumption that the general tax lien outranks all competing interests. The 1966 Act made no change in section 6321, which creates a lien in favor of the United States for the amount of tax, together with incidentals, that anyone has

cial interests are set forth, and described in detail, in Section 6323(c)-(h) of the Code. 26 U.S.C. 6323(c)-(h). Although these new provisions are not directly applicable to the priority afforded a judgment lien creditor—which was not altered in the 1966 Act—they nonetheless reveal Congress's clear acceptance of the established rule that the federal tax lien has priority in property acquired by a taxpayer *after* notice of the federal tax lien has been filed.

For example, in amending Section 6323(a), Congress provided a priority for a "security interest" that comes into existence before notice of the federal tax lien is filed. 26 U.S.C. 6323(a). Congress provided, however, that a "security interests exists" for purposes of this provision only "at such time as the property is in existence" (26 U.S.C. 6323(h)(1)). By requiring that the property subject to the security interest be "in existence" for the security interest to be perfected against the unfiled tax lien, Congress applied the ordinary commercial rules of "attachment" [14] and recognized that "there can be no UCC security interest in property if the debtor at the time of its purported creation has no rights therein." Coogan, *supra*, 81 Harv. L. Rev. at 1383.[15] The

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'neglected' to pay, upon all his property and rights to property. Chiefly, section 6323 is an elaborate set of qualifications on the assumption that such lien is good against all comers." Young, *supra*, 34 U. Chi. L. Rev. at 724.

[14] The Federal Tax Lien Act of 1966 represents "in part an attempt to conform the lien provisions of the internal revenue laws to the concepts developed in [the] Uniform Commercial Code." H.R. Rep. No. 1884, *supra*, at 1-2.

[15] The federal requirement that "the property [be] in existence" for the private security interest to prime the unfiled tax lien under Section 6323(h)(1) applies "even though local law may relate a security interest back to an earlier date and even

House Report on the Federal Tax Lien Act of 1966 thus states specifically that a prior-filed security interest does *not* have priority over the federal tax lien with respect to "assets acquired after the tax lien filing." H.R. Rep. No. 1884, 89th Cong., 2d Sess. 8 (1966).

When a security interest attaches to property acquired *after* notice of the federal tax lien is filed, the federal tax lien thus has priority under Section 6323(a). See 26 U.S.C. 6323(h)(1); H.R. Rep. No. 1884, *supra*, at 8. In this situation, however, the security interest may nonetheless "be protected in accordance with the provisions of new subsections (c) and (d)." H.R. Rep. No. 1884, *supra*, at 35. Section 6323(c) protects certain types of "commercial transaction" security interests (which do not include judgment liens) that "came into existence after tax lien filing," but only if such interests arise under "the terms of a written agreement entered into before tax lien filing" (26 U.S.C. 6323(c)(1)). If the theory of the court of appeals in this case were accepted—and a prior-filed private lien were given priority over the tax lien with respect to property acquired "after tax lien filing"—it would have been unnecessary for Congress to enact the special commercial financing provisions of Section 6323(c) and (d). By enacting the carefully limited exceptions for special types of commercial financing agreements, however, Congress clearly did *not* alter the general rule that the federal lien has priority in property "acquired after the tax lien filing." H.R. Rep. No.

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though it might be an effective security interest as of the earlier date under the Uniform Commercial Code." H.R. Rep. No. 1884, *supra*, at 11-12.

1884, *supra*, at 8.[16] That general rule controls this case.

B. This Court's Decision in *United States* v. *Vermont* Does Not Alter The General Rule That The Federal Tax Lien Has Priority In Property Acquired by The Taxpayer After Notice of The Tax Lien Is Filed

For a private lien to be perfected against the federal tax lien under Section 6323(a), the private lien must have "attached to the property in question" (*United States* v. *City of New Britain*, 347 U.S. at 86) before notice of the federal tax lien is filed. The court of appeals erred in concluding (Pet. App. 10a-12a) that this Court's decision in *United States* v. *Vermont*, 377 U.S. 351 (1964), requires a different result.

The *Vermont* case did not concern the question of when a private lien attaches to the taxpayer's property and becomes perfected against the federal tax lien. Instead, *Vermont* concerned the different question whether a state tax lien that applies to "all" the debtor's property was "sufficiently specific" to encompass the debtor's bank accounts as "property subject to the lien," as required by *United States* v. *Waddill, Holland & Flinn, Inc.*, 323 U.S. at 356, and *United States* v. *City of New Britain*, 347 U.S. at 84. In *Vermont*, the Court held that the word "all" sufficiently described the property owned by the debtor to which the lien applied and therefore satisfied the standard of specificity required by *Waddill* and *City of New Britain*. See 377 U.S. at 358. The Court in

[16] See Coogan, *supra*, 81 Harv. L. Rev. at 1414 ("For protection as to collateral added * * * after tax lien filing, [the secured party] must fit his transaction into one of the categories of subsection (c) or qualify for a purchase money interest under case law."). See also note 10, *supra*.

Vermont did *not* hold that the State's lien could have attached to, and thus been perfected in, *property that the taxpayer did not own before the federal tax lien was filed*. The Court neither addressed nor abandoned the general rule that, for the private lien to be perfected against the federal tax lien, it must have "attached to the property in question" before notice of the tax lien is filed. Nor did the Court abandon the settled rule that the property must exist, and the taxpayer must have rights in it, before the private lien may attach to the property and become perfected against the unfiled federal tax lien. See H.R. Rep. No. 1884, *supra*, at 8; pages 7-17, *supra*.

C. The Property At Issue In This Case Was Not Acquired By The Taxpayer Until After Notice Of The Federal Tax Lien Was Filed

When the Bank docketed its judgment against the McDermotts on July 6, 1987, it gained no lien upon *any* property. As the lower courts acknowledged, the Utah statute (Utah Code Ann. § 78-22-1 (1992)) creates a lien only upon real property of the judgment debtor (Pet. App. 2a, 20a), and the land contract by which the McDermotts in 1981 sold the South Street property left them with an interest that Utah law classified as personalty (*id.* at 6a n.5, 19a-20a). See *Cannefax* v. *Ciement*, 818 P.2d 546 (Utah 1991), aff'g 786 P.2d 1377, 1380 (Utah Ct. App. 1990). It was only when the McDermotts foreclosed the defaulted land contract and reacquired the South Street property on September 23, 1987, that a lien upon that property in favor of the Bank came into existence.[17] Pet. App. 2a-3a, 21a.

[17] Federal law, of course, "determines the priority of competing liens asserted against the taxpayer's 'property' or

Meanwhile, when the Internal Revenue Service assessed unpaid federal income taxes against the McDermotts in December 1986, the United States gained a lien for the amount of the unpaid taxes, and interest, "upon all property and rights to property, whether real or personal, belonging to such [taxpayers]." 26 U.S.C. 6321. And, when the United States filed notice of the federal tax lien with the Salt Lake County Recorder on September 9, 1987, it made that lien invulnerable to the claim of any subsequent "purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor" under Section 6323(a) of the Code. 26 U.S.C. 6323(a); see Pet. App. 2a, 17a. As matters then stood, the United States had a mature and perfected lien upon the interest of the McDermotts in the South Street property, and the Bank had no lien—or a lien upon nothing.[18] So matters stood until September 23, 1987, when the McDermotts reacquired the South Street

'rights' to 'property.'" *Aquilino* v. *United States*, 363 U.S. 509, 514 (1960). It is well established as a matter of federal law that the doctrine of relation back may not be applied to perfect a private lien that was not perfected at the time notice of the tax lien is filed. See *United States* v. *Pioneer American Ins. Co.*, 374 U.S. at 92 n.11; *United States* v. *Security Trust & Savings Bank*, 340 U.S. at 50. See also note 15, *supra*.

[18] Prior to foreclosure on September 23, 1987, the defaulting purchaser's interest in the real estate was not subject to the Bank's judgment lien against the McDermotts. See page 19, *supra*. The purchaser could have sold the property—and thereby satisfied their sale contract with the McDermotts—free of any claim by the Bank. But, if such a sale had occurred, the McDermotts' interest in the proceeds of the sale would have been subject to the federal lien under Section 6321 of the Code. See 26 U.S.C. 6321 (tax lien applies to "all property and rights to property, whether real or personal").

property by foreclosure, and thereby gained real property to which the Bank's judgment lien could attach.[19]

The courts below erred in holding that, even though the lien of the Bank did not attach to the reacquired property until *after* notice of the tax lien had been filed, the Bank's lien was entitled to priority on the basis, as the district court held (Pet. App. 21a-24a), of the rule of "first in time, first in right", or, as the court of appeals held (*id.* at 7a-13a), because "creditors who perfect their liens before the filing of a federal tax lien have priority" (*id.* at 13a). The Bank's lien was not "first in time," nor was it "perfected before the filing of a federal tax lien," because the Bank's lien had not "attached to the property in question" (*United States* v. *City of New Britain*, 347 U.S. at 86) before notice of the tax lien was filed.

Before the McDermotts reacquired the South Street property, the Bank had the mere hope "of a more perfect lien to come" (*United States* v. *Security Trust & Savings Bank*, 340 U.S. at 50 (quoting *New York* v. *Maclay*, 288 U.S. at 294)). Since the Bank's lien in the South Street property did not attach to that

[19] The district court read the escrow agreement to waive the priority of the United States based upon its lien upon the McDermotts' interest in the land contract, so that, when the McDermotts reacquired the property, "the liens of the competing claimants simultaneously attached as against the merged interests in real property" (Pet. App. 21a). The court of appeals agreed with this interpretion of the escrow agreement (*Id.* at 6a). Even if that proposition is accepted (see note 2, *supra*), there is no doubt that the federal lien could and did attach to the taxpayer's real property interest in the South Street property when reacquired by the McDermotts. See *Glass City Bank* v. *United States*, 326 U.S. 265 (1945).

property until *after* notice of the tax lien was filed, the tax lien has priority under Section 6323(a).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In The

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Petitioner,

v.

BRUCE J. McDERMOTT and BETTY McDERMOTT, ZIONS FIRST NATIONAL BANK, N.A.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR RESPONDENT ZIONS FIRST NATIONAL BANK, N.A.

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STATUTORY PROVISIONS INVOLVED

In addition to those statutory provisions cited by Petitioner (hereinafter "IRS"), the following is offered:

1. Utah Code Annotated § 78-22-1 (1992 Repl.) provides:

> From the time the judgment of the district court or circuit court is docketed and filed in the office of the clerk of the district court of the county it becomes a lien upon all the real property of the judgment debtor, not exempt from

execution, in the county in which the judgment is entered, owned by him at the time or by him thereafter acquired during the existence of said lien. . . .

STATEMENT OF THE CASE

1. Prior to August 21, 1981, Bruce J. McDermott and Betty B. McDermott ("McDermott") were the owners of fee simple title to certain real property located in Salt Lake City, Utah (hereinafter the "Property"). On or about August 21, 1981, McDermott as "Seller", entered into a Real Estate Contract with third parties, as "Buyer" for the sale and purchase of the Property. To secure in part the Buyer's obligation under the Real Estate Contract, McDermott accepted from the Buyer a Note and a Trust Deed on the Property securing said Note with Buyer's interest in the Property, notwithstanding the fact that legal title to the Property remained vested in McDermott.[1] (Pet. App. 3a-4a, 17a).

[1] Throughout its Brief, beginning in paragraph 1 of its Statement, the IRS attempts to resurrect the issue of the personalty character of McDermott's interest in the original Real Estate Contract. Although it acknowledges the fact that both the District and Tenth Circuit courts specifically held that through express agreement, the IRS had consensually waived its rights to the personalty as collateral (IRS Brief pp. 4-5, n. 2) and professes not to seek "further review of the lower courts' interpretation of that agreement" (*Id.*), the IRS has expended considerable effort to review facts otherwise irrelevant to this appeal. Notwithstanding the acknowledgement of the irrelevance of the personalty collateral issue to the narrowly framed question preserved, because of the inclusion of that issue in the IRS Brief, Zions will include such facts and argument as are necessary to respond to the IRS argument.

2. On June 22, 1987, a Judgment was entered in the Third Judicial District Court of Salt Lake County, State of Utah, against McDermott and in favor of Zions First National Bank (hereinafter "Zions") in the amount of $67,977.67 together with post-judgment interest and attorneys fees, which Judgment was duly docketed with the Salt Lake County Clerk on July 6, 1987 in Book 213 as Entry No. 2402 and immediately became a valid lien against all of McDermott's real property and after-acquired property located in that county. (Pet. App. 2a, 17a; J. App. 26).

3. On September 9, 1987, a Notice of Federal Tax Lien Under Internal Revenue Service was filed with the Salt Lake County Recorder's Office alleging an unpaid tax liability of McDermott in the amount of $103,657.93 which immediately upon filing also became a general lien against all of McDermott's real property and after-acquired property located in that county. (Pet. App. 2a, 17a; J. App. 27).

4. As a result of an eventual breach of Buyer's default in the payment obligations of the Real Estate Contract and the Note, McDermott commenced a power of sale foreclosure on the Property, the actual Trustee's Sale for which occurred on September 23, 1987. The high bidder at the Trustee's Sale was McDermott, who repurchased the Property with a credit bid. (Pet. App. 4a, 17a-18a).

5. Following the Trustee's Sale, negotiations were pursued between Zions and the IRS concerning the respective priorities of their competing lien claims against the Property and potential sales proceeds therefrom. Ultimately, in contemplation of a pending sale of the Property by McDermott to independent parties (hereinafter "Hansons"), a written Escrow Agreement (hereinafter the "Agreement") was prepared memorializing a consensual ordering of the priorities of the respective lien claims of Zions and the IRS as applicable to the proceeds. (J. App. 17-25). The Agreement, dated March 4, 1988, and executed by McDermott, Zions and the IRS, contains the following negotiated language:

3. It is understood that the releases delivered herewith by the IRS and Zions are unconditional. The monies placed in escrow shall be in lieu of all legal or equitable rights of the IRS and Zions to the real property released by them as part of this agreement. Neither party hereto waives any rights, defenses and claims that they may have had or any of them may have had in any interest in and to the real property, such rights being reserved and shall apply to the cash proceeds being held in escrow in substitution of the subject real property. *The respective priorities of the parties to the cash proceeds shall be identical to the priorities of the respective liens of the parties as they existed against the real property as of September 23, 1987, after Bruce J. McDermott successfully bid and purchased the property at the Trustee's Sale, notwithstanding the change in form of collateral.*

(J. App. 20, ¶3 (emphasis added)).[2]

6. Concurrently with the execution of the Agreement and in compliance with the provisions thereof, Zions executed a Partial Release of its Judgment Lien and the IRS executed a Certificate of Discharge, both particular to the Property and which were delivered to the escrow agent, to facilitate the obtaining of title insurance. (J. App. 20, ¶¶4 and 5).

7. Also concurrently with the execution of the Agreement and pursuant to its terms, McDermott sold the Property to Hansons, the net proceeds of which totaled $135,575.50 and were paid into the Third District Court of Salt Lake County, State of Utah, together with the filing of a Complaint for Interpleader by McDermott commencing this action. (J. App. 9-16).

8. The suit was removed from the state court to the United States District Court for the District of Utah on motion of the IRS. (Dist. Crt. R. 1). Zions and the IRS thereafter filed Motions for Summary Judgment, each asserting that it was entitled to satisfy its lien from the proceeds first. (Dist. Crt. R. 3 and 7). In a Memorandum

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[2] In paragraph 2 of its Statement, the IRS asserts that "the IRS and the Bank released their claims on the real property but reserved their rights to the cash proceeds of the sale." In addition to the irrelevant nature of that assertion for the reasons discussed in note 1, above, the IRS has misread the Agreement. The language cited in the paragraph 3 of the Agreement specifically orders the "priorities of the parties to the cash proceeds." There is no mention in the Agreement of any reservation of prior rights to the personalty proceeds. The lower courts found none that would preserve the claim of the IRS thereto and the IRS apparently does not contest that finding.

Decision and Order, dated January 17, 1989, (Pet. App. 16a-24a) granting summary judgment in favor of Zions, the Honorable J. Thomas Greene held that the Agreement had reordered the priorities of the competing liens as against the proceeds to be identical to the respective priorities of the liens as they existed against the real property interest of the Property immediately following the Trustee's Sale.[3] (Pet. App. 21a). The District Court further held that between the two simultaneously attaching liens, Zion's judgment lien enjoyed a priority over the IRS tax lien because of its earlier date of docketing. (Pet. App. 22a-23a).

9. Pursuant to an appeal by the IRS, the Tenth Circuit Court of Appeals reviewed and upheld the decision of the District Court. (Pet. App. 1a-15a). The Tenth Circuit affirmed the finding that the Agreement had consensually resolved any issues as to the validity and real property character of the competing liens. (Pet. App. 6a-7a). Following *United States v. Vermont*, 377 U.S. 351 (1964), it further held that Zions' judgment lien was "non-contingent," had obtained choate status prior to the

[3] Before the Trustee's Sale, neither Zions nor IRS held any interest in the real property character of the Property. Prior to their repurchase of the Property at the Trustee's Sale, McDermott held only a personalty interest in the contract rights of the Real Estate Contract. *Cannefax v. Clement*, 818 P.2d 546 (Utah 1991); *Lach v. Deseret Bank*, 746 P.2d 802, 805 (Utah 1987); *Butler v. Wilkinson*, 740 P.2d 1244, 1254 (1987). The real property interest remained in the Buyer by equitable conversion through the Real Estate Contract. Only upon purchase by McDermott of the Property at the Trustee's Sale were the liens of Zions and the IRS able to attach specifically to the real property interest of McDermott in the Property.

filing of the tax lien, and thus was entitled to priority as to the proceeds from the sale of the Property. (Pet. App. 12a). The fact that the specific Property was obtained by McDermott subsequent to the perfection of both the judgment lien and the tax lien did not affect the choateness of those liens which, being general in nature, applied to *all* of McDermott's real property located in Salt Lake County. (*Id.*)[4]

SUMMARY OF ARGUMENT

A judgment lien in Utah is a general lien automatically perfected against all real property owned by the judgment debtor located in the county in which the lien is properly docketed. Utah Code Annotated § 78-22-1 (1992 Repl.) A federal tax lien similarly is effective against all real property owned by the taxpayer immediately upon the filing of the Notice of said lien with the appropriate County offices. 26 U.S.C. §§ 6321, 6323. Both liens enjoy automatic attachment rights as to all real property

[4] Contrary to the assertions of the IRS (IRS Brief p. 6, note 3), the Tenth Circuit distinguished rather than rejected the opinion of the Fifth Circuit in *Southern Rock, Inc. v. B & B Auto Supply*, 711 F.2d 683 (1983). The Fifth Circuit had found that competing liens of the IRS and a private secured creditor were in fact filed and perfected simultaneously. Because neither was placed in record before the other, that Court ordered a sharing of the proceeds of the sale of the property in proportion to their respective claims. The Tenth Circuit distinguished this case for the obvious reason that Zions' judgment lien was perfected over two months prior to the filing of the IRS's tax lien. (Pet. App. 13a-14a).

acquired by the debtor/taxpayer after the perfection of the liens in the county where the liens are of record. *Glass City Bank v. United States*, 326 U.S. 265, 268 (1945).

The federal law used to determine contests between competing liens is "first in time is first in right." *United States v. City of New Britain*, 347 U.S. 81, 85 (1954). In order to be recognized in a lien contest with a federal tax lien, the competing judgment lien must be choate, or "perfected in the sense that there is nothing more to be done." *Id.* at 84. The fact that the judgment lien is general in nature and not specific as to any particular parcel of real property is insignificant. *Id.* A general non-contingent lien is sufficiently choate to obtain priority over a subsequently filed tax lien. *United States v. Vermont*, 377 U.S. 351, 359 (1964).

The legislative and judicial pronouncements covering federal tax lien priorities have been shifting from the original position of protection of the secret tax lien to the recognition that all creditors of a debtor/taxpayer should be treated fairly and on an equal footing. *Southern Rock, Inc. v. B & B Auto Supply*, 711 F.2d 683, 689 (5th Cir. 1983). The universal rule of "first in time is first in right" should be applied in this case to protect the prior docketing of Zions' judgment lien over the later-filed federal tax lien on all of McDermott's real property, including the after-acquired Property in question. This result would encourage the prompt filing of liens and protection of all diligent creditors including the IRS. *McAllen State Bank v. Saenz*, 561 F. Supp. 636, 640 (S.D. Tex. 1982).

ARGUMENT

I. Zions Judgment Lien became choate prior to the subsequently filed federal tax lien.

The first issue usually to be resolved in a federal tax lien priority case is the validity and extent of the competing liens which depend upon the rights of the debtor/taxpayer to the property subject of the liens. *Aquilino v. United States*, 363 U.S. 509, 512 (1960). Those issues are to be determined by state law. *Id.* The Tenth Circuit correctly stated that in this case neither party has raised an objection to the validity of the other's general lien or to the real property character of McDermott's interest in the Property facilitating the competing liens. (Pet. App. 7a).

The respective lien claims of Zions and the IRS are based upon separate and distinct authorities. The statutory judgment lien claimed by Zions attaches to all real property owned or thereafter acquired by the judgment debtor upon the docketing of the judgment with the Clerk of the Court in the county in which the real property is located. Utah Code Annotated § 78-22-1 (1992 Repl.).[5] Pursuant to that statute, the Utah State Supreme Court has unfailingly held that the docketing of a judgment is the act which automatically creates the lien. *Orton v. Adams*, 21 Utah 2d 245, 444 P.2d 62, 63 (1968). No further act of the creditor or any judicial or administrative body is necessary. "[A] judgment automatically

[5] Effective April 27, 1992, the Utah State legislature repealed the former § 78-22-1 as set forth in the Statutory Provisions Involved Section, above. That section was replaced by a new statute with similar language and the identical effect as the prior provision. Utah Code Annotated § 78-22-1 (1992 Supp).

becomes a lien upon all nonexempt real property of the judgment debtor at the time it is docketed. [Creditor's] right to a judgment lien is unconditional and is not subject to alteration by a court on equitable grounds." *Taylor National, Inc. v. Jensen Brothers Construction Company*, 641 P.2d 150, 155 (Utah, 1982).

A federal tax lien claimed by the IRS may attach to all real *and* personal property of a delinquent taxpayer pursuant to 26 U.S.C. § 6321. First authorized at the close of the Civil War, the federal tax lien existed as a potent "secret lien" which, even though unrecorded, enjoyed priority over all competing liens. With the Act of March 4, 1913, ch. 166, § 3186, 37 Stat. 1016, Congress first protected judgment creditors and others against federal tax liens which had not been duly filed in a designated office.[6] In 1966, Congress passed the first major reform to the 1913 Act[7] for the express purpose of conforming "the lien provisions of the internal revenue laws to the concepts developed in the Uniform Commercial Code."[8]

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[6] See generally, Plumb, *Federal Liens and Priorities – Agenda for the Next Decade*, 77 YALE L.J. 228, 229 (1967) and Kennedy, *From Spokane County to Vermont: The Campaign of the Federal Government Against the Inchoate Lien*, 50 Iowa L.Rev. 724 (1965) for the historical significance of the Federal Tax Lien Act of 1966.

[7] Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 101, 80 Stat. 1125.

[8] In his speech proposing passage of the 1966 Act, Representative Mills remarked: "The major provisions in this bill are designed to protect creditor's rights. . . . One of the things we were concerned about is that there are so many innocent people who are unaware of any possibility of a tax lien." Also rising in support of the bill was Representative Byrnes: "The intent of these amendments as they relate to the priority of federal liens is to promote equity and facilitate commerce by making the legal rules governing tax liens more certain and fair." United States Congressional Record – House, September 12, 1966, pp. 22,226 and 22,227.

Although effective as of the date of the tax assessment, the priority of the tax lien as against competing claimants including judgment lien creditors is now based upon the date that the Notice thereof is filed with the appropriate county recorder.

> The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary.

26 U.S.C. § 6323(a). In this case, where the IRS consensually waived its lien against the personalty intents in the Real Estate Contract, the only property being claimed under the general tax lien is all of the real property located in Salt Lake County and owned by the delinquent taxpayer – the identical Property claimed by Zions.

By common law, the first lien of record against a debtor's property has priority over those subsequently filed unless a lien-creating statute clearly shows or declares an intention to cause the statutory lien to override.[9] Now known as the universal rule of "first in time is

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[9] This principle, denoted the "cardinal rule," was laid down by Chief Justice Marshall in *Rankin & Schatzell v. Scott*, 25 U.S. (Wheat) 177, 179 (1827): "The principle is believed to be universal that a prior lien gives a prior claim, which is entitled to prior satisfaction, out of the subject it binds unless the lien be intrinsically defective. . . . "

the first in right," this doctrine has been the subject of frequent reliance by this and other federal courts (*United States v. City of New Britain*, 347 U.S. 81, 85 (1954); *Merger v. United States*, 375 U.S. 233, 236 (1963); *United States v. Equitable Life Assurance Society*, 384 U.S. 323, 327 (1966)) and by Congress in the enactment of federal tax lien legislation (*United States v. City of New Britain*, 347 U.S. at 85).

It is equally well settled that federal law determines the priority between federal tax liens and state created or authorized liens. *United States v. Equitable Life Assurance Society of the United States*, 384 U.S. at 328 (1966). Under current Section 6323(a) of the Internal Revenue Code, a judgment lien creditor is granted priority over a competing federal tax lien when the judgment lien is perfected or "choate" prior to the filing of the Notice of Tax Lien. *United States v. City of New Britain*, 347 U.S. 81, 85-86 (1954). *United States v. Pioneer American Insurance Company*, 374 U.S. 84, 88 (1963). Whether or not a judgment lien is choate is also a federal question. *United States v. Security & Savings Bank, Executor*, 340 U.S. 47, 49-50 (1950). This Court has historically required "the identity of the lienor, the property subject to the lien, and the amount of the lien" to be established in order for the lien to be classified as "choate." *City of New Britain*, 347 U.S. at 84; *Spokane County v. United States*, 279 U.S. 80 (1929). This same requirement has been adopted into the IRS regulations for purposes of the application of 26 U.S.C. § 6323(a).

> The term "judgment lien creditor" means a person who has obtained a valid judgment, in a court of record and of competent jurisdiction, for recovery of specifically designated property or for a certain sum of money. In the case of a judgment for the recovery of a certain sum of money, a judgment lien creditor is a person who has perfected a lien under the judgment on the property involved. A judgment lien is not perfected until the identity of the lienor, the property subject to the lien, and the amount of the lien are established.

26 C.F.R. § 301.6323(h)-1(g).[10]

The purpose of the choateness doctrine as applied to federal tax liens is to protect the uniform standard of the federal liens. "Otherwise a State could affect the standing of federal liens contrary to the established doctrine, simply by causing an inchoate lien to attach at some arbitrary time even before the amount of the tax, assessment, etc. is determined." *United States v. City of New Britain*, 347 U.S. at 86. This Court has consistently held that in order to be choate, a lien must have achieved a condition of finality as to fact and amount.[11] Balancing against the judicial policy requiring the choateness is the expressed legislative and judicial intent to protect creditors from secret tax liens and promote equity among competing lien creditors

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[10] As found by the District Court, the definition of "judgment lien creditor" as used in 26 U.S.C. § 6323(a) and set forth in 26 CFR § 301.6323(h)-1(g) "clearly" includes the judgment lien of Zions as docketed (Pet. App. 22a-23a, note 7).

[11] See *United States v. Acri*, 348 U.S. 211 (1955) (attachment lien was found "inchoate" because the validity of the lien and the amount secured thereby was contingent) and *United States v. Security Trust & Savings Bank*, 340 U.S. 47 (1950) (attachment lien found to be essentially a *lis pendens* requiring further proceedings to perfect the lien and therefore inchoate).

of the debtor's assets.[12] One of the purposes of the Federal Tax Lien Act of 1966 was "to treat the government like any other creditor." *Southern Rock, Inc. v. B & B Auto Supply*, 711 F.2d 683, 689 (5th Cir. 1983).

The IRS argues that Zions' judgment lien, being general in nature, could not have achieved choateness until the purchase of the Property by McDermott and the simultaneous attaching of the competing liens specifically thereto. This argument disregards the clear intent of Congress and the prior declarations of this and other federal courts. Section 6323 limits the priority of the federal tax lien by declaring the same to be invalid as against a judgment lien creditor "until notice thereof . . . has been filed." Therefore, the completion or docketing of any qualified judgment lien prior to the filing of the tax lien endows that judgment lien with priority. The fact that a judgment lien is general in nature (as opposed to being specific as to any particular parcel of real property) has no significance. *United States v. City of New Britain*, 347 U.S. at 84.

In *United States v. Vermont*, 377 U.S. 351 (1964) this Court was asked by the IRS to declare that a state-created lien, generally enforceable against all of the debtor's property, lacked the choateness to entitle it to priority over a subsequently filed federal tax lien. This Court observed that the extent of the state lien was identical to that of the federal tax lien and that absent special rules from Congress, the basic rule of "first in time, first in

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[12] See note 8, *supra*.

right" would apply. In dealing with the issue of a specificity of the requirement for the identifying of property subject to the state lien, the Court held that a general lien over all of the debtors property "is sufficiently choate to obtain priority over the later federal lien." *Id.* at 359.

Vermont has been cited and followed by circuit and district courts for the proposition that a non-contingent general lien on all of a person's real property is "choate" and if so perfected prior to the federal tax lien, will take priority over the federal lien,[13] regardless of whether after-acquired property is involved.[14]

By execution of the Agreement, Zions and the IRS stipulated that their respective claims to the Hanson sale proceeds would be determined solely by their respective priority claims as against the real property interest in the Property at the moment of the purchase of same by McDermott. Zions' judgment lien had, on July 6, 1987, become non-contingent and choate.[15] The amount of the lien, the identity of the debtor, and the fact that the lien was fixed upon all McDermott's real property located in Salt Lake County, had been determined. Nothing more

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[13] See e.g., *Donald v. Madison Industries, Inc.*, 483 F.2d 837, 841 (10th Cir. 1973); *In the Matter of Thriftway Auto Rental Corp.*, 457 P.2d 409, 413 (2nd Cir. 1972).

[14] See e.g., Pet. App. 10a; *McAllen State Bank v. Saenz*, 561 F. Supp. 636, 639 (S.D. Tex. 1982); *Wisconsin v. Bar Coat Blacktop, Inc.*, 640 F. Supp. 407, 414 (W.D. Wisc. 1986); Plumb, FEDERAL TAX LIENS 134-35 (3rd ed. 1972) ("the typical general judgment lien on 'all' the debtor's real property seems safe from later tax liens").

[15] Utah Code Annotated § 78-22-1 (1992 Repl.).

was required of Zions to further perfect its lien.[16] Similarly, the IRS general tax lien became perfected on September 9, 1987 as to all real property then or thereafter owned by McDermott. The nature of McDermott's interest in the Property remained personalty (outside of the reaches of either IRS or Zions stipulated liens) until the Trustee's Sale on September 23, 1987 at which time McDermott acquired the Property reuniting the legal and equitable interests. At that moment, pursuant to the express terms of the Agreement, both Zions' judgment lien and the IRS tax lien immediately and simultaneously attached specifically to the Property.

II. Having obtain choate status prior to the filing of the federal tax lien, Zions' judgment lien is entitled to priority on the after-acquired Property.

The issue of priority of liens simultaneously attaching to after-acquired property of a debtor has resulted in an evolution of case law through continued analysis over the past 41 years. Resort to the Tax Code on this particular issue has not been determinative. "Section 6323 certainly was not enacted to decide dead heats among racing lien holders." *Texas Oil & Gas Corporation v. United States*, 466 F.2d 1040, 1052 (5th Cir. 1972), *cert. denied*, 410 U.S. 929 (1973).

Apparently, first discussed theoretically in *United States v. Graham*, 96 F. Supp. 318 (S.D. Cal. 1951), *aff'd sub nom, California v. United States*, 195 F.2d 530 (9th Cir. 1952), *cert. denied*, 344 U.S. 831 (1952), the analysis was

[16] *United States v. City of New Britain*, 347 U.S. at 84.

prefaced by that court's remarks: "The determination of this question is not necessary to the decision in this case." However "assuming arguendo" that the claimant competing with the federal tax lien had a valid lien, that court surmised without citation to any authority, that a federal tax lien would be superior to any simultaneously attaching interest of another party. 96 F. Supp. at 321. *Graham* was thereafter favorably cited again in dictum and without statutory or other authority, in several cases cited by the IRS in its Brief.[17] In these cases, the court actually found that the claimant competing with the federal tax lien had failed to perfect its lien and was therefore subordinate and junior to the IRS. Resolution of the ultimate issue of simultaneous attachment was not necessary nor made the subject of serious analysis.

The first known reported case to wrestle with the issue directly was *Iowa Fair Plan v. United States*, 257 N.W.2d 626 (Iowa 1977). There, in a five to four split decision, the court held that because a first-filed state lien attached simultaneously with a federal tax lien on after-acquired property of the borrower, it failed to become choate "before the tax lien."[18] *Id.* at 629. Accordingly, it

[17] *United States v. Meyer*, 346 F. Supp. 554 (S.D.N.Y. 1972); and *MDC Leasing Corp. v. New York Property Insurance Underwriting Association*, 450 F. Supp. 179 (S.D.N.Y. 1978).

[18] Neither Section 6823 nor *United States v. City of New Britain*, 347 U.S. 81 (1954) contains language requiring either the attachment or perfection of a competing lien "before the tax lien." Rather, it provides that the tax lien lacks validity until the filing of the appropriate notice. Simultaneous attaching is not addressed in the statute nor has it been the subject of this Court's opinion. Even assuming that the state lien lacked

presented the federal tax lien with ultimate priority without any cite to statutory authority for the elevating decree.

The next discovered case on point began the movement to analyze the respective rights of the competing lien claimants in light of this Court's acknowledgment of the "first in time rule." In *United States v. Fleming*, 474 F. Supp. 904 (S.D.N.Y. 1979), various state, city and federal tax liens were filed against the taxpayer, all prior to their purchase of certain personal property. By statute, each of the tax liens covered after-acquired property. The IRS argued that based on the dicta of *Graham*, the IRS should receive priority status notwithstanding the simultaneous attaching of the tax liens upon the purchase by Fleming of the property. The same district which had previously cited *Graham* favorably[19], now disapproved of its sweeping reasoning, limited it to its facts, and declared that the state liens enjoyed an equal footing with the IRS liens.

The Federal District Court in Texas made the earliest comprehensive analysis of the after-acquired property issue in *McAllen State Bank v. Saenz*, 561 F. Supp. 636 (S.D. Tex. 1982). In a case remarkably similar to the present matter, that court was required to determine the relative priorities of a federal tax lien and a judgment lien to the

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choateness until that lien specifically attached to the property in question (which assumption Zions vigorously disputes), the construction of the statute by the *Iowa Fair Plan* Court was neither required nor justified by statutory or case precedent.

[19] *United States v. Meyer*, 346 F. Supp. 554 (S.D.N.Y. 1972); *MDC Leasing Corp. v. New York Property Insurance Underwriting Association*, 450 F. Supp. 179 (S.D.N.Y. 1978).

proceeds of a foreclosure sale of after-acquired real property. As is the law in Utah, a judgment lien in Texas is perfected as to all real property situated in the county in which the judgment is indexed or docketed. The Court acknowledged that both judgment and tax liens attach to after-acquired property, and cited *United States v. Vermont*[20] in deciding that the competing liens, although general in nature, were both choate and properly perfected. 561 F. Supp. at 639. *Graham* was discarded on its facts with no deference to its unsupported dicta. The doctrine of pro rata distribution of simultaneously attached property set forth in *Fleming* was cited as being in accord with Texas law. Nevertheless, inasmuch as the determination of tax lien priorities is governed by federal law,[21] the federal rule of "first in time, first in right" required the court to order the first payment of proceeds to satisfy the first lien of record even though both lien claimants preceded the purchase of the property by the debtor. In analyzing the policy implications for its holding, the Court declared: "This rule encourages the diligent filing of liens whether or not after-acquired property is involved." *Id.* at 640.

Taking the opportunity to review the relevancy and reliability of most of the above-cited cases, the Wisconsin District Court encountered the same issue in *Wisconsin v. Bar Coat Blacktop, Inc.*, 640 F. Supp. 407 (W.D. Wisc. 1986). Narrowly limiting *Graham* and its progeny to their specific facts, that Court rejected the notion that on the issue of simultaneously attaching liens, "tie goes to the federal

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[20] 377 U.S. 351 (1964).

[21] *Aquilino v. United States*, 363 U.S. 509, 512-513 (1960).

government." 640 F. Supp. at 414. Finding "no legal or policy reason that would mandate a deviation" from the "first in time, first in right rule," the Court ordered that the funds on deposit be paid as against the numerous pre-acquisition liens in the order of their perfection.

The Fifth Circuit Court took the opportunity to review this issue while addressing the issue of competing lien claims which were perfected simultaneously against property of a debtor. In *Southern Rock, Inc. v. B & B Auto Supply*, 711 F.2d 683 (5th Cir. 1983), the Court refused to follow the rule of *MDC Leasing, supra*, that any competing lien simultaneously attaching with the tax lien lacked choateness prior to attachment and was therefore inferior. It recognized that one of the purposes of the Federal Tax Lien Act of 1966 was "to provide some limited but specific relief from the harshness of the choateness rule."[22] *Id.* at 689. To the extent that § 6323 provides an unambiguous answer to federal tax lien priority questions, choateness requirements were found to be "supplanted." In further discussion of the purpose of the 1966 Act, the Court declared:

> In our view, another aspect of choateness that no longer floats, although concededly not specifically addressed by § 6323, is the notion that a tie goes to the government. To the extent that the purpose of the Federal Tax Lien Act was to conform tax liens to Article 9 security interests, *the way to achieve this goal is to treat the government like any other creditor*. Giving the government's filed tax lien priority over a

[22] *Rice Investment Co. v. United States*, 625 F.2d 565, 569 (5th Cir. 1980).

> simultaneously recorded security interest would defeat this goal. We do not believe that is what Congress intended.

711 Fed.2d at 689 (emphasis added). The Fifth Circuit recognized the legislatively initiated evolution in case law which has removed the unauthorized ultimate-priority demanded by the IRS in favor of the treatment of lien claims on equal footing.

The present case, most factually similar to *McAllen State Bank*, was properly resolved below in conformance with that opinion as confirmed by *Bar Coat Blacktop*. Zions' judgment lien was choate and perfected as to all real property then and thereafter owned by McDermott at the date of docketing. Nothing further was required of Zions to attach the non-contingent lien on after-acquired property. Utah Code Annotated § 78-22-1 (1992 Repl.). Likewise, the federal tax lien was choate and perfected as to all real property then or thereafter owned by McDermott as of September 9, 1987. *Glass City Bank v. United States*, 326 U.S. 265, 268 (1945). Both liens having attached specifically to the Property simultaneously, the federal rule of "first in time, first in right" must apply to the time of perfection or choateness of the respective liens. Zions' lien was properly accorded priority over the IRS's subsequently filed lien. *United States v. Vermont*, 377 U.S. 351 (1964); *United States v. City of New Britain*, 347 U.S. 81 (1954).

CONCLUSION

Based on the foregoing analysis, the Court should affirm the Order of the Tenth Circuit Court of Appeals.

Respectfully submitted.

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